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In the Supreme Court of the United States

October Term 1976
No. ——— 76-1316

FRANK S. BEAL, Secretary of the Department of Public Welfare, et al.,
Petitioners

v.

THE HONORABLE RAYMOND J. BRODERICK, Judge of the United States District Court for the Eastern District of Pennsylvania,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petition 1
Order Below

IN THE SUPREME COURT
OF THE UNITED STATES

No. ——— October Term 1976

FRANK S. BEAL, Secretary of the Department of Public Welfare, et al.,

Petitioners

v.

THE HONORABLE RAYMOND J. BRODERICK, Judge of the United States District Court for the Eastern District of Pennsylvania,

Respondent

PETITION

Petitioners, Frank S. Beal, *et al.*, respectfully petition that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 28, 1976.

ORDER BELOW

The order of the Court of Appeals is unreported but appears in the Appendix at 78a. The orders entered by respondent allowing the United States of America to intervene and participate as a plaintiff in *Halderman v. Pennhurst*, C.A. No. 74-1345 (E.D. Pa. Complaint filed May 30, 1974) are not reported but appear in the Appendix at 57a, 59a.

JURISDICTION

The order of the Court of Appeals for the Third Circuit was entered on December 23, 1976. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254 (i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant sections of the Fourteenth Amendment of the United States Constitution are as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1985 provides:

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for

lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy, set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. §1986 provides:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

42 U.S.C. §1988 provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into

effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Rule 24 of the Federal Rules of Civil Procedure provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or de-

fense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. §2403.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in dismissing petitioners' request that a writ of mandamus or prohibition issue directing respondent to vacate the orders allowing intervention, and denying dismissal, of the United States as a plaintiff in the case of *Halderman v. Pennhurst?*

2. Did the respondent abuse his discretion and exceed his jurisdiction by allowing the United States of America to intervene in the *Halderman v. Pennhurst* action, and by denying petitioners' motion to dismiss the United States of America.

STATEMENT OF THE CASE

The underlying action which gave rise to petitioners' request for mandamus is *Halderman v. Pennhurst,* C.A. No. 74-1345 (E.D. Pa. Complaint filed May 30, 1974). That action was brought by named residents of Pennhurst State School and Hospital [1] and maintained on behalf of all individuals who, since May 30, 1974, have resided in Pennhurst, as well as those who in the future may reside at Pennhurst. In this action brought pursuant to the Civil Rights Act of 1871, those plaintiffs requested extensive injunctive relief and damages exceeding five million dollars. Their claims were predicated upon *inter alia,* the Eighth and Fourteenth Amendments and involved a broad challenge to the living conditions at Pennhurst.

By motions filed pursuant to Federal Rule of Civil Procedure 24, the United States sought to intervene as a plaintiff in the *Halderman* action (26a,55a). [2] Petitioner promptly objected urging that the United States lacked standing or authority to intervene, and therefore did not

[1] Pennhurst State School and Hospital, hereafter referred to simply as "Pennhurst", is a residential treatment center for the mentally retarded. Pennhurst is operated by the Commonwealth of Pennsylvania.

[2] The United States' complaint in intervention is reproduced at 37a. That complaint, which challenges the living and treatment conditions at Pennhurst, asserted jurisdiction under 28 U.S.C. §1343 and rested its claims on various civil rights statutes. 42 U.S.C. Sections 1983, 1985, 1986, and 1988 (37a). However, none of these statutes authorize the United States to initiate or intervene in suits thereunder.

possess the requisite "interest" required by that rule (43a-54a). Nevertheless, the intervention was allowed without opinion, on January 17, 1974 (57a).

Petitioners then moved to dismiss the United States of America as a plaintiff-intervenor on October 7, 1974 (58a). Once again petitioners pointed to the United States' general lack of standing or interest sufficient to participate as a party in the proceedings. This motion, along with numerous other motions for protection from the burdensome discovery demands of the United States was denied by respondent on November 29, 1976 (59a-63a).

Petitioners sought certification of the question to the Court of Appeals (64a), pursuant to 28 U.S.C. §1292-(b). The respondent was also requested to stay any further participation of the United States in that action pending the requested interlocutory appeal (66a). Both requests were denied on December 13, 1976 (67a).

On December 20, 1976, petitioners sought mandamus or, in the alternative, prohibition from the Court of Appeals (68a). That petition was dismissed on December 23, 1976. This petition for a writ of certiorari therefore seeks review of the Court of Appeals' dismissal of the petition for a writ of mandamus.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' Refusal To Correct the Respondent's Clear Abuse of Jurisdiction by Mandamus or Prohibition Under the Circumstances of This Case Should Be Reviewed by this Court

The extraordinary remedy of mandamus is only available in unusual cases. The circumstances that exist here, coupled with the grave constitutional implications of the respondent's actions clearly mark this as such a case.[3]

1. The United States has absolutely no legally cognizable interest which it seeks to protect by intervening in the *Halderman* case. Certainly it has not been harmed or threatened by the petitioners' administration of Pennhurst, nor is any such injury alleged. In fact, Pennhurst is funded to a large extent by the federal government. For example, it is currently estimated that over one-fourth of the total Pennhurst budget is received from the federal government under Title XIX of the Social Security Act (Medicaid), 42 U.S.C.A. §1396, *et seq.* However, the federal government has not, by this intervention sought in any way to limit that continued funding.[4] Thus while

[3] This Court has refused a request for certiorari in a somewhat similar case. *Estelle v. Justice*, 426 U.S. 925 (1976) (Mr. Justice Rehnquist dissenting). However, for the reasons set forth below, it is urged that the instant case and present circumstances compel a different result.

[4] The United States has sought only injunctive relief from what it asserted are illegal or unconstitutional conditions at Pennhurst (41a-42a).

challenging the legality of the conditions of Pennhurst the United States at the same time contributes financially to that institution's continued operation.

By allowing this intervention, the respondent has found the United States to have standing where, in similar cases, other courts have not. *United States v. Solomon*, 419 F. Supp. 358 (D. Md. 1976, appeal pending). In *Solomon* the United States sought to challenge the legality of the conditions in one of Maryland's mental health facilities.[5] Dismissing the suit because the United States lacked standing or congressional authority to maintain the action, Judge Northrop concluded:

> "The issue of executive authority which has thus been joined by this Motion To Dismiss has far-reaching implications for the functioning of a system of constitutional, democratic government based on a balance of powers. See *Estelle v. Justice*, 426 U.S. 925, 929, 96 S.Ct. 2637, 49 L.Ed. 2d 380 (1976) (Rehnquist, J., dissenting from a denial of certiorari). After exhaustive consideration of the relevant arguments and authorities, this Court has reached the emphatic conclusion that the power of the executive branch of government does not extend to bringing a suit such as this one and that defendants' Motion To Dismiss should therefore be granted."

Id. at 361. That court noted further:

> "This Court has no doubt that the instant lawsuit stems from a benevolent desire on the part of

[5] Rather than intervening, the United States initiated the *Solomon* action, in all other respects *Halderman* and *Solomon* are indistinguishable.

officials of the Department of Justice to improve the lot of the mentally retarded. Important and compelling as a charitable aspiration for helping the mentally retarded achieve a meaningful existence may be, however, it must not be allowed to impel a procedural result which by implication, if not the direct effect, would threaten the delicate balance of power which the Constitution conceives among the various branches of the federal government and between the federal and state governments. This conclusion does not leave the mentally retarded without remedy for violations of their constitutional rights; it simply means that lawsuits aimed at protecting these rights must be brought by proper plaintiffs."

Id. at 361, 362. See also *United States v. Kellner,* C.A. No. 74138 (D. Mont.) (similar suit brought by the United States dismissed for lack of standing); *United States v. School District of Ferndale, Michigan,* 400 F. Supp. 1122, 1131, 1141 (E.D. Mich. 1975); *United States v. County School Board of Prince George County, Va.,* 221 F. Supp. 93 (E.D. Va. 1963); *United States v. Biloxi Municipal School District,* 219 F. Supp. 691 (S.D. Miss. 1963), aff'd on other grounds 326 F.2d 237 (5th Cir. 1964), *cert. den.* 379 U.S. 929 (1964).

2. In this case it is probable that the issue of the United States' standing or authority to proceed against the petitioners will evade appellate review. The relief requested by the United States runs exclusively to Pennhurst residents who are thus members of the plaintiff class. This, along with the fact that there presently are individual plaintiffs in the case who admittedly possess standing renders appellate review of this critical issue very unlikely.

Village of Arlington Heights v. Metropolitan Housing Development Corporation, —— U.S. ——, 97 S.Ct. 555, 562, n. 9 (1977).

Without the benefit of a full judicial review of this threshold jurisdictional issue the executive branch of the federal government, in petitioners' view, will have successfully extended its authority in this area beyond any hitherto recognized Constitutional or Congressional limitations. Furthermore, *Halderman v. Pennhurst* is not an isolated case. In the mental health area alone, petitioners are aware of many instances in which the United States has assumed the role of a litigant: *Stamus and United States v. Leonhardt and State of Iowa,* C.A. No. 73-126-2, 44 U.S.L.W. 2581 (5/28/76) (S.D. Iowa 1976); *Rone and United States v. Fireman,* C.A. No. 75-35A (N.D. Ohio); *Stockton and United States v. Stewart,* C.A. No. 2834-N (M.D. Ala.); *Gary W. and United States v. Stewart,* C.A. No. 74-2412-C (E.D. La.); *Ewing v. Gaver,* C.A. No. C-74-147 (N.D. Ohio); *Jenkins v. Cowley,* 384 F. Supp. 441 (N.D. Tex. 1974); *United States v. Commonwealth of Pennsylvania,* 394 F. Supp. 261, 533 F.2d 107 (3rd Cir. 1976); *United States v. Kellner,* C.A. No. 74138 (D. Mont.); *Alexander and United States v. Hall,* 64 F.R.D. 152 (D. S.C. 1974); *Horacek and United States v. Exon,* 357 F. Supp. 71 (D. Neb. 1973); *Davis v. Watkins,* 384 F. Supp. 1196 (N.D. Ohio 1974); *United States v. Solomon,* 419 F. Supp. 358 (D. Md. 1976); *North Carolina Ass'n. for Retarded Children and United States v. North Carolina,* C.A. No. 3050 (E.D. N.C.); *New York Ass'n. for Retarded Children and Parisi v. Carey,* 357 F. Supp. 752 (1972); *Morales v. Turman,* 326 F. Supp. 677, 364 F. Supp. 166, 383 F.

Supp. 53 (E.D. Tex. 1974); *Wyatt v. Stickney*, 325 F. Supp. 781, 334 F. Supp. 1341, 344 F. Supp. 373, 344 F. Supp. 387, *sub nom. Wyatt v. Aderholt*, 368 F. Supp. 1382, 368 F. Supp. 1383, 503 F.2d 1305 (5th Cir. 1974).[6] As the foregoing list indicates, the federal government is engaged in nothing short of a national campaign to impose standards upon the States which it deems to be proper in the area of mental health care.[7] Viewed in this context it is clear that mandamus is entirely appropriate here, lest these repeated abuses continue. *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).

3. The questions raised by this petition are of great magnitude involving the delicate area of federal-state relations. Mandamus must be more readily available when such grave issues come to the front. *Will v. United States*, 389 U.S. 90, 95 (1967), *Maryland v. Soper*, 270 U.S. 9, 29 (1926).

Finally, if petitioners are unable to check respondent's abuse of jurisdiction by mandamus they will irreparably suffer in several ways. First, petitioners individually are potentially liable for millions of dollars in

[6] Not included in this list, in addition to cases of which petitioners are unaware, are cases not involving mental health, *e.g. Ruiz v. Estelle*, C. A. No. 5523 (E.D. Tex.); and *Gates and United States v. Collier*, 407 F. Supp. 1117 (N.D. Miss. 1975). *Ruiz* and *Gates* involve prisons but nonetheless raise similar questions regarding the propriety of the United States' participation therein. *Estelle v. Justice*, 516 F.2d 480 (5th Cir. 1975), *cert. den.* 426 U.S. 925 (1976) (Mr. Justice Rehnquist dissenting).

[7] Apparently those in the federal government charged with approving state mental health facilities for Medicaid funding disagree as to these standards, for they continue to approve Pennhurst for Medicaid funding.

damages, which claims are in a very real sense being prosecuted by the United States.[8] Further, petitioners will continue to be oppressed by the overwhelming litigation strategy of the federal government. Finally, Pennsylvania may be forced to accept treatment standards dictated by a faction of the federal government, without the benefit of a meaningful review of the threshold question of the propriety of the federal government's participation in the litigation.

CONCLUSION

For the foregoing reasons petitioners respectfully request that this Court grant the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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[8] The United States has clearly assumed the lead role in this litigation on behalf of all the plaintiffs notwithstanding that it seeks no damages.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action Number 74-1345 (filed May 30, 1974)

Terri Lee Halderman, a retarded citizen, by her mother and legal guardian, Winifred Halderman,

Plaintiff

v.

Pennhurst State School and Hospital; Department of Public Welfare; Helene Wohlgemuth, Secretary of the Department of Public Welfare; C. Duane Youngberg, Superintendent, Pennhurst State School and Hospital; Robert Smilovitz, Assistant Superintendent, Pennhurst State School and Hospital; Margaret Green, Betty Uphold, Alice Barton, Patricia Lyttle, J. Nagle, P. E. Klick, Mary Shanta, Dr. Hedley, Dr. Parocca, Helen Francis, Ms. Weiler, Staff, agents and employees of Pennhurst State School and Hospital; John Doctor, Jane Nurse, Jack Aide, Jill Therapist, Richard Roe, and Jane Roe, unknown and unnamed staff, employees and agents of Pennhurst State School and Hospital, all individuals sued in their official and individual capacities,

Defendants

COMPLAINT—CLASS ACTION

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I. PRELIMINARY STATEMENT

1. Plaintiff, Terri Lee Halderman, by her mother and legal guardian, Winifred Halderman, brings this civil rights action for damages, declaratory relief and injunctive relief as a result of injuries she suffered and continues to suffer during her commitment to Pennhurst State School and Hospital, an institution for the retarded. Portions of the action are brought for a class.

2. Plaintiff has suffered a variety of physical injuries—including, inter alia, bruises, multiple fractures, abrasions, and drug overdose, associated emotional and psychological trauma and harm. These injuries are the result of action, inaction and negligence on the part of Defendants. Plaintiff has been and remains "poorly nourished" (the hospital records have so described this condition); she has been and continues to be restrained mechanically, without proper authorization, unnecessarily, for the convenience of staff and as a substitute for habilitation; she has been and remains ill-clothed and insufficiently trained in self-help exercises; she has suffered and continues to suffer physical and psychological injury from deficiencies in education, outdoor recreation, availability of indoor recreational toys, and improper eating utensils for food; she has suffered and continues to suffer from inadequate and improper supervision including unqualified and unnecessary medical attention. Class members suffer identical and similar problems.

3. The Plaintiff and her class suffer, in terms of their general and particular conditions, a deprivation and denial of their constitutional, statutory and common law right to treatment, and a deprivation and denial of their constitutional right to the least restrictive conditions necessary to achieve the purposes of commitment, right to refuse treatment, right to be free from Cruel and Unusual Punishment, right to Due Process of Law and right to the Equal Protection of the Laws.

II. JURISDICTION

4. Jurisdiction is conferred upon this Court by:

a. 28 U.S.C. 1343(3) and 1343(4) which provide for original jurisdiction in all suits for redress of deprivation, under color of law, of Constitutional rights, privileges or immunities under federal law.

b. 28 U.S.C. 1343(1) and 1343(2) which provide for original jurisdiction in suits for damages arising from conspiracies to violate civil rights under 42 U.S.C. 1985 and in suits to recover damages from persons who fails to prevent violations of civil rights.

c. Plaintiff's action for declaratory and injunctive relief, and for damages, is authorized by 28 U.S.C. 2201, 2202, and by Rules 57 and 65 of the Federal Rules of Civil Procedure, which relate to declaratory judgments and injunctions, and by 42 U.S.C. 1983 and 1988 which relate to civil rights actions and by 42 U.S.C. 1985 and 1986.

d. 28 U.S.C. 1331 which provides for original federal question jurisdiction. The amount in controversy herein, exclusive of interest and costs, is greater than $10,000.

5. Defendants herein are sued in their official and individual capacities. Each of the Defendants is a state instrumentality or a person who, for each incident and time in question herein, has acted and acts under color of state law.

III. PLAINTIFF

6. Plaintiff Terri Lee Halderman was born July 29, 1953. She is retarded. Plaintiff was committed to Pennhurst State School and Hospital on February 15, 1966 by her parents for treatment and habilitation and for the purpose of providing an environment able to protect her dignity, rights and capabilities and a professionally supervised program to deal with the problems of a severely retarded individual.

7. Plaintiff, a citizen of the United States, resides presently at Pennhurst State School and Hospital. Plaintiff's mother and legal guardian, Winifred Halderman, resides at 209 Vernon Road, Morrisville, Pennsylvania 19067.

IV. DEFENDANTS

8. Defendant Pennhurst State School and Hospital (hereafter, "Pennhurst") is a Pennsylvania state mental institution and a "facility" under the state Mental Health and Mental Retardation Act of 1966, 50 P.S. 4101, 4102. Plaintiff has been a resident there since February 15, 1966. Pennhurst is located at Spring City, Pennsylvania.

9. Defendant Department of Public Welfare supervises and operates all activities of all Pennsylvania mental institutions, including Pennhurst, and is responsible for such facilities and for the actions of its employees, including those at Pennhurst 50 P.S. 4201, 4202.

10. Defendant Helene Wohlgemuth is Secretary of the Defendant Department of Public Welfare, Harrisburg, Pennsylvania. She is charged, under 71 P.S. 66 and 50 P.S. 4101, et seq., with responsibility for exercising the powers and performing the duties vesting in her office and person and the Department of Public Welfare. She is responsible for the actions and decisions of all Department employees. She has had personal knowledge of the matters complained of in this Complaint.

11. Defendant C. Duane Youngberg is the Superintendent of Pennhurst and is responsible for the day-to-day functioning of the institution and for the general supervision of the treatment of the residents. He had direct knowledge or should have had direct knowledge of wrongs done to Plaintiff.

12. Defendant Robert Smilovitz is the Assistant Superintendent of Pennhurst and has responsibility for the day-to-day functioning of the institution and for the supervision of the treatment of the residents. He has had

direct knowledge or should have had knowledge of the wrongs done to Plaintiff.

13. Defendants Margaret Green, Betty Uphold, Alice Barton, Patricia Lyttle, J. Nagle, P. E. Klick, and Mary Shanta, R.N., are each employees and staff members of Pennhurst who were involved in the incident described below in which Plaintiff incurred multiple fractures of her jaw.

14. Defendants Hedley and Parrocca are physicians, first names unknown at this time, at Pennhurst who have had direct and immediate responsibility for the physical and psychological care of Plaintiff and have had, or should have had, direct knowledge of the numerous injuries to Plaintiff and of the conditions of continuous danger to Plaintiff's well-being.

15. Defendants Helen Francis and Mrs. Weiler (first name unknown at this time) are present and past directors of the hospital unit at Pennhurst in which Plaintiff has resided. They are responsible for the treatment of Plaintiff and have had or should have had knowledge of the wrongs done to her.

16. Defendants John Doctor, Jane Nurse, Jack Aide, Jill Therapist, Richard Roe and Jane Roe are unknown and unnamed employees of Defendant Department of Public Welfare and Defendant Pennhurst State School and Hospital who are or were physicians, nurses, child care aides, and other employees.

17. Defendants Department of Public Welfare, Pennhurst State School and Hospital, Wohlgemuth, Youngberg and Smilovitz are aware of the deplorable and unconscionable conditions at Pennhurst and of the sub-

standard inadequate and illegal treatment and non-treatment to which Plaintiff and her class are subjected. They have direct and actual knowledge of these wrongs, do nothing to effectively prevent or halt them and conspire to continue them.

18. At all times relevant herein, the Defendants, and each of them, knew or should have known of the policies, practices, acts, omissions and conditions alleged herein.

V. CLASS ACTION ALLEGATIONS

19. For the declaratory and injunctive relief which will affect the operation and maintenance of the institution Pennhurst and will end the illegal and unconstitutional practices there, Plaintiff brings this action on her own behalf and on behalf of all other persons similarly situated. The members of the class are all residents of Pennhurst State School and Hospital.

20. This is a proper class action under Rule 23(a) and 23(b)(1) and 23(b)(2) of the Federal Rules of Civil Procedure. The class is so numerous as to make joinder of all members impracticable. There are substantial questions of law and fact common to the entire class and the claims of the plaintiff are typical of the claims of the class and predominate over any questions affecting only individual members. The named plaintiff will adequately and fairly represent the interests of the class. This class action is superior to any other available method for the fair and efficient adjudication of the controversy.

21. The questions of law and fact involved are:

a. Do Defendants act under color of state law?

b. Have Defendants conspired to violate Plaintiff's rights and those of her class or have they failed to prevent violation of such rights? Have Defendants violated the rights of Plaintiff and her class?

c. Are the facts and conditions at Pennhurst as alleged herein and do they violate the rights of Plaintiff and her class, as alleged herein?

VI. FACTUAL ALLEGATIONS

The Totality of Citizens Residing at Pennhurst, Including Plaintiff, Live Under Adverse and Dangerous Conditions

22. Pennhurst has a resident enrollment of approximately 1600 persons and a staff which is deficient by a minimum of 146 staff members. Staff-resident ratios are deficient according to the recognized professional standards, including the *Standard for Residential Facilities for the Mentally Retarded* of the Joint Commission on Accreditation of Hospitals. The Defendants are aware of this deficiency, as indicated by a document prepared by them which is attached as Exhibit A, [Exhibit omitted from Appendix to Petition] a true and correct copy thereof, and incorporated by reference. The Exhibit A lists 11 wards at Pennhurst and compares the number of staff required under the Joint Commission standards and the current staff census—on nine wards, there is insufficient staff. Plaintiff's ward, Ward 47, is one of the numerous understaffed wards.

23. The staff-to-resident ratio is inadequate to assure each resident's health, safety, comfort, education, habilitation, training and treatment.

24. Due to poor staffing and poor facilities and poor supervision, Pennhurst residents daily suffer needless and preventable physical injuries.

25. Residents at Pennhurst receive sedative drugs not necessary for their care and treatment but rather for management and control for the convenience of staff. These drugs are often administered over the objections of the residents and/or their parents and guardians.

26. Due to the conditions at Pennhurst, the level of functioning of residents often deteriorate and decline, rather than remaining stable or improving.

27. Inadequate attention by staff to residents result in neglect of proper hygiene and sanitation, poor bathing and related practices and needless contraction of communicable and other diseases.

28. Clothing is unpersonalized, ill-fitting and often improper for the weather. Time outdoors is not adequately provided for the residents.

29. Straight-jackets, wrist restraints and leather straps are used unnecessarily and without proper authorization. Restraints used are not always the least restrictive ones available.

30. Other conditions at Pennhurst are generally oppressive, poor, improper, inadequate, insufficient and in violation of professional, humane and legal standards for the treatment and care of the retarded.

The Named Plaintiff's Situation

31. Rather than attempting to catalogue the full range of abuses suffered by the class of Pennhurst residents, the tragic and unfortunate details of the named

Plaintiff will be described. The wrongs done to her are similar in kind to the wrongs done to her class. The remedies for such wrongs are also similar or, in some aspects, identical.

Incidents Causing Physical Injury to Plaintiff

32. Since her admission to Pennhurst, Plaintiff has been involved in over forty (40) reported incidents which are as follows (based on hospital records):

a. 3/2/66 a skinned left knee

b. 3/2/66 scratch on lower left eye

c. 3/5/66 discoloration of right leg

d. 3/10/66 sore on head by her hairline

e. 5/13/66 abrasion of her left cheek

f. 5/15/66 scratches on her right wrist and left ear.

g. 5/18/66 scratches to the left side of her neck

h. 12/2/66 laceration of the mouth

i. 3/21/67 tooth knocked out

j. 11/9/67 cut over left eye

k. 5/17/68 swelling on right side of head

l. 5/16/70 overdose of drugs mellaril

m. 6/1/70 laceration on back of head

n. 5/27/70 bite on arm

o. 7/20/70 laceration of chin

p. 9/14/70 laceration of chin

q. 9/19/70 reopening of the sutured chin laceration

r. 10/21/70 laceration on the right side of head

s. 11/16/70 laceration below the chin

t. 12/1/70 brush burn over lower left eye

u. 12/1/70 scratched by another resident

v. 12/13/70 scratched back (by another resident)

w. 1/30/71 Plaintiff bitten on third finger of right hand and of left elbow by another resident

x. 2/17/71 soft lump on top of head

y. 3/1/71 scratches on back

z. 3/21/71 laceration on left side of head

aa. 4/19/71 fracture of proximal phalanges, 2d, 3d and 4th fingers, and a fracture of the second metacarpal, proximal end

bb. 6/13/71 small red mark on left cheek

cc. 7/14/71 fall suffered on wet floor

dd. 7/18/71 two sores on right wrist

ee. 8/3/71 scratches on right side of face

ff. 8/22/71 bite on left wrist by another resident

gg. 9/12/71 bruised left ankle

hh. 10/23/71 sore hands

ii. 10/26/71 multiple (3) fractures of jaw

jj. 2/23/72 bruise on left side of head

kk. 3/21/72 laceration of big toe

ll. 5/9/72 swollen and discolored right foot

mm. 5/28/72 swollen right foot

nn. 6/4/72 laceration of forehead

oo. 6/9/72 brush burn on last two toes

pp. 6/30/72 small laceration on forehead

qq. 2/7/73 lesion inside mouth which was infected

rr. 6/15/73 fractured big toe

ss. 11/4/73 laceration on back of head

A true and correct copy of an accident summary prepared by Pennhurst on September 1972 is attached as Exhibit B [Exhibit omitted from Appendix to Petition] and incorporated by reference; this demonstrates knowledge by Defendants of these injuries. Notes of subsequent injuries listed above may be found in Plaintiff's medical records as follows: accident reports dated June 4, 1972 and November 4, 1973; progress records dated May 16, 1970 and June 15, 1973, and a letter describing the injury of February 7, 1973.

33. Plaintiff has suffered the above physical injuries during her recent years at Pennhurst. Many of these were caused by other residents or as a result of causes allegedly unknown or unconfirmed; some the hospital reports were "self-inflicted." Few or none of these incidents and injuries would have occured had Defendants properly supervised Plaintiff and maintained the institution.

34. The Defendants knew that Plaintiff was being improperly supervised and that the injuries continually and repeatedly suffered by Plaintiff resulted proximately from this supervisory deficiency and incompetence and gross negligence.

35. A single example will illustrate the lack of supervision. On June 15, 1973, Plaintiff's left toe was fractured. Plaintiff's mother was informed that, at the time, because of a hospital policy on budgetary savings, there was a shortage of shoelaces and Plaintiff was barefoot because there were no shoelaces for her shoes. Thus, an otherwise harmless fall resulted in a fracture.

In any case, the hospital's own investigation revealed that there was a lack of supervision at the time the

fall took place. In a "Special Report", dated June 15, 1973 and June 20, 1973, Richard L. Matthew, Assistant Director of Resident Life, stated:

> The residents were being supervised in one day room by one aide while the other child care aides were involved in the showering, drying and dressing. The aide from the day room was in and out while returning the residents from the shower room door.

It was during this process that the accident occurred. See Exhibit C [Exhibit omitted from Appendix to Petition], a true and correct copy of the original report, attached and incorporated by reference.

36. Considering the series of unfortunate and unnecessary injuries to Plaintiff, it is clear and it is alleged that a condition and environment dangerous and deleterious to Plaintiff's health and well-being—and that of her class—has existed and persists, a condition concerning which Defendants are aware but have done nothing to remedy.

The "Tooth" Incident

37. On October 26, 1971, Plaintiff suffered multiple fractures of her jaw. In a manner not atypical of the incompetent care given by Defendants, some Defendants decided that there was a "tooth" hanging in Plaintiff's bleeding jaw; it later became apparent that this was not a tooth but a piece of broken cartilage, part of a broken jaw. Nevertheless, before consulting a doctor or summoning a doctor, the Defendants involved here pulled on the "tooth" causing much pain and suffering to Plaintiff. When the Plaintiff was discovered bleeding, instead of enlisting a doctor's services and advice immediately, the

defendant resident aides attempted to control the profuse bleeding by applying cold compresses. The circumstances surrounding this incident are best described in the words of an investigating team at Pennhurst which reported:

> Terri Halderman got out of bed at approximately 4:00 a.m. Her protective helmet was placed on her head at this time. From 4:00 a.m. to 5:00 a.m. she wandered around the dayroom and toilet areas banging her head and screaming. Shortly after 5:00 a.m. Terri began hitting her wrists on the doorknob of the private clothing room. At his (sic) time she was placed in a camisole by Nagle and Green. At approximately 6:05 a.m. Miss Lyttle saw Terri fall backwards and land on her right hip. Terri did not appear to be injured at this time and Lyttle helped her to her feet. At approximately 6:10 a.m. Mrs. Nagle found Terri sitting on the floor with her legs crossed at nearly the same location she fell earlier. She was bleeding from the mouth. Mrs. Nagle helped Terri to a bench and notified Miss Lyttle. They applied cold compresses to the injured area. There appeared to be a "right front" tooth missing. At this time Mrs. Green was in another area of the cottage and Mrs. Klick was in the office. It has not yet been determined exactly where Mae Voight (the working resident) was at this time. At approximately 6:15 a.m. Miss Lyttle called Mrs. Uphold (CCA supervisor) and reported the accident. Mrs. Uphold told her to continue the cold compresses. The bleeding subsided to (sic) approximately 6:20 a.m., but commenced again moments later. At approximately 6:30 a.m. Miss Lyttle called Mrs. Uphold again to report that rather heavy bleeding had commenced and that

there appeared to be a "tooth handing (sic) by just a little skin" from her upper jaw. Mrs. Uphold called Mrs. Shanta R.N. to report the difficulty in controlling the bleeding and the loose tooth. Mrs. Shanta told Mrs. Uphold to have the aides pull the tooth out and continue the cold compresses. Mrs. Uphold called the cottage and relayed the message. When the tooth was removed it was found not be a tooth but a piece of cartilage-like substance. While applying compresses at this time, Miss Lyttle "felt her jaw move strangely"—making a grinding-like sound. It was was (sic) "bleeding coming from the lower jaw." Miss Lyttle called Mrs. Uphold at approximately 6:35 a.m. and reported this to her. Mrs. Uphold said to continue the compresses. Mrs. Uphold called Mrs. Shanta and asked her to come see Terri. Mrs. Uphold arrived on C-3 at approximately 6:40 a.m. and assisted in the administration of first aid. At approximately 6:45 a.m. Mrs. Shanta arrived on the ward and examined Terri. She then phoned Dr. Marshall and Dr. Soroka at his home. Dr. Soroka state that he would be in to see the resident by 7:30 a.m. The bleeding subsided at approximately 6:50 a.m. Mrs. Uphold returned to her office to finish her regular work. Mrs. Shanta left the ward at 7:15 a.m. Dr. Soroka arrived at approximately 7:25 a.m. and had Terri transferred to the Hospital.

The above is quoted from a Pennhurst State School and Hospital Accident Investigaiton Report, a four page, five sheet document signed by Dr. James C. Hirst, Ph.D. and other hospital officials. This report is incorporated by reference and a true and correct copy thereof is attached

as Exhibit D [Exhibit omitted from Appendix to Petition.]

38. The investigating committee of Pennhurst concluded that the Pennhurst employees, Defendants hereinacted improperly and that:

1. The time lapse from discovery of the injury to the hospital admission was too long;

2. The nurse should not have advised the "tooth" extraction.

3. The aides should not have attempted the "tooth" extraction.

4. The professionals involved did not respond promptly or thoroughly enough;

5. The practice of permitting residents who are confined in a camisole (i.e., straightjacket) to wander about the cottage must not be permitted.

39. The above described incident involves acts of gross neglect and negligence by Defendant nurses, aides and institution. An improperly authorized medical directive was administered by untrained and unauthorized staff members in a negligent and improper manner. This sort of negligence continues to today both with regard to Plaintiff and to her class.

Improper Medication

40. Although Plaintiff receives no drugs while visiting the home of her parent or while visiting other private homes, and although she functions well in such a nonsedated state, she receives, despite the objections of her parent, daily injections of a sedative drug when in residence at Pennhurst.

41. The drugs which Plaintiff receives are not necessary for her care and treatment, but rather are administered for the convenience of the staff members. Plaintiff's class is similarly treated with unnecessary medication, thus subjecting them to unpleasant and sometimes dangerous side-effects without cause or need.

42. On May 16, 1970, Plaintiff did in fact receive an overdose of the tranquilizing drug mellaril, requiring hospitalization and treatment. This overdose is confirmed by the institution's Progress Record entry at that date.

Regression—Deterioration

43. Plaintiff's condition has deteriorated during her residency at Pennhurst. While she was once able to express herself verbally, she has been during her stay at Pennhurst verbally incommunicative. No attempts have been made by Defendants to help or encourage the Plaintiff to regain her verbal abilities.

44. Plaintiff's physical appearance graphically illuminates her deterioration. She has lost practically all her front teeth, has many facial scars, and is pitifully undernourished.

45. Plaintiff and the members of her class are deteriorating and regressing both emotionally and physically due to the environment provided by Pennhurst and the Defendants.

Hygiene

46. Since Plaintiff is severely retarded, she is incapable of maintaining herself in proper hygienic fashion. Although the Defendants are responsible for Plaintiff's hygienic concerns, she often has an offensive odor due

to inadequate bathing as a result of continued inadequate staff attention.

47. Plaintiff has received limited self-help training only five days per week. For someone in her situation, such an unsustained effort is not a sufficient regimen for a responsible attempt to habilitate Plaintiff.

48. Plaintiff's digestive capabilities require that she receive her food in a pureed state. However, Palintiff has suffered stomach disorders due to the ingestion of non-pureed food.

49. Due to Plaintiff's condition and the fact that her self-help training has been insufficient, Plaintiff has been unable to attend to her dental needs. In a progress record in Plaintiff's medical records of May 16, 1970, the doctor indicated that she suffered from "poor oral hygiene".

50. Although the dayroom in which Plaintiff spends considerable time has a cold tile floor, she is often allowed to walk about in her bare feet. On occasion, Plaintiff's mother has found her daughter shivering with cold.

51. Plaintiff's clothing is unpersonalized, ill-fitting and often improper for keeping her warm and comfortable. This is also true for her class.

52. Plaintiff and her class are not taken outside onto hospital grounds as often as the weather and proper treatment would require.

53. Toys and other stimulation which could provide Plaintiff with a safe and suitable form of indoor recreation and habilitation are kept in a closet and are thus

unavailable to her when in the dayroom. Plaintiff's class is similarly denied and deprived access to such stimulation and toys.

Physical Restraints

54. Plaintiff is often confined in a camisole (straight-jacket) or posey wrist restraints and leather straps. This is also true for the class.

55. Plaintiff, and members of her class, are often placed in restraints without proper authorization or reason.

56. The restraints used are not the least restrictive ones necessary on many occasions. Posey vests, for example, would provide less restrictive but equally effective restraint in certain circumstances than camisoles or leather straps.

Attempts by Plaintiff's Guardian at Remedy

57. Plaintiff's mother has attempted to remedy and redress the wrongs suffered by Plaintiff by communicating with various officials and persons in positions of responsibility. These pleas have either been ignored or been ineffective.

58. On September 2, 1972, for example, Winifred Halderman wrote to Defendant Helene Wohlgemuth indicating that she had written to Wohlgemuth some time before complaining about the poor treatment her daughter, the Plaintiff, was receiving at Pennhurst, and that this abuse still persisted. Ms. Halderman lamented the poor conditions and requested that Ms. Wohlgemuth, as Secretary of the Department of Public Welfare, alleviate the problems.

59. On June 18, 1973, Ms. Halderman again wrote to Defendant Wohlgemuth to complain about, inter alia, unnecessary restraints, improper clothing, inadequate staffing and the generally inhumane conditions at Pennhurst.

60. Ms. Halderman received a reply as a result of the above September, 1972 letter from Commissioner of Mental Retardation Edward R. Goldman, then Commissioner of Mental Retardation under Defendant Wohlgemuth. Mr. Goldman wrote on September 14, 1972 that he understood "from Secretary Wohlgemuth that you have sent her a similar letter" and that "we are aware of the problems existing in the State facilities for the mentally retarded. . . ."

61. Other persons contacted by Ms. Halderman include various officials at Defendant Pennhurst, several state Congresspersons, the Bucks County Department of Mental Health-Mental Retardation, the Allegheny County Chapter of the Pennsylvania Association for Retarded Children, the Pennsylvania State Police, then Insurance Commissioner Herbert Denenberg, Governor Milton Shapp, Ralph Nader and President Richard M. Nixon.

62. Ms. Halderman has for years attempted to improve the conditions at Pennhurst for her daughter, the Plaintiff, and for the class, by her work with various parents and community groups in and around Pennhurst and by active contact with Pennhurst officials and the Board of Trustees.

63. Because of the failure of these attempts to mobilize administrative or legislative results, Ms. Halderman finds it necessary to initiate this action.

VII. CAUSES OF ACTION

For Plaintiff's causes of action, each enumerated below, she realleges paragraphs 1 through 63 above, as if fully set forth herein in each cause of action, and further alleges:

First Cause of Action

64. Plaintiff and her class have been denied their Constitutional right to treatment, in violation of the Due Process Clause of the Fourteenth Amendment. It is a fundamental violation of due process to institutionalize or provide institutionalization for a person for the purpose of affording him or her therapeutic treatment and habilitation and then deny him or her such treatment or habilitation.

65. For the retarded, included in the right to treatment is the right to habilitation, proper medical treatment, education, and care, suited to the resident's needs, regardless of age, degree of retardation or handicapping condition. A resident has the right to an habilitation program which will maximize human abilities and enhance the ability to cope with his or her environment.

66. Due to the adverse living conditions and deficient supervision and care, Plaintiff and her class are denied their right to dignity, privacy and humane care which underlie the right to treatment and are founded in the First, Ninth and Fourteenth Amendments to the United States Constitution.

Second Cause of Action

67. Plaintiff and her class have been denied their Constitutional right to treatment in violation of the Equal

Protection Clause of the Fourteenth Amendment. The state law and defendant officials have classified certain persons as civilly committable for institutionalization at Pennhurst based on their condition and need for treatment. Other persons at other state facilities do receive adequate treatment for similar conditions (e.g., the Woodhaven Institution); persons at Pennhurst do not receive adequate treatment. There is no rational basis for this classification and disparity in treatment. Confinement of the mentally ill or retarded without treatment deprives them of the equal protection of the laws.

Third Cause of Action

68. Plaintiff and her class have been denied their statutory right to treatment. Pennsylvania state statutes at 50 P.S. 4402(a) and 4403(a) provide that "voluntary admission to a facility" is for "examination, *treatment and care.*" (emphasis supplied). This provision grants a statutory right to adequate and proper treatment which is not being implemented or respected by Defendants.

Fourth Cause of Action

69. Plaintiff and her class have a constitutional right to be protected from bodily harm and abuse and conditions which cause them to be in a state of danger and deterioration. Defendants violate this basic right.

Fifth Cause of Action

70. Plaintiff and her class are subjected to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

Sixth Cause of Action

71. Plaintiff and her class have been denied their constitutional right to the least restrictive conditions

necessary to achieve the purposes of commitment in violation of the Due Process Clause of the Fourteenth Amendment.

72. This violation occurs in two ways:

a. Defendants utilize such restraining measures as camisoles (straightjackets), posey wrist restraints and leather straps when less restrictive measures (or less time with the more restrictive measures) would suffice.

b. By not providing adequate treatment and habilitation, Plaintiff and her class do not improve in condition and functioning to the extent possible and to be expected in a proper program. Thus, institutionalization is needlessly prolonged and use of less restrictive community care facilities is not utilized to the proper extent.

Seventh Cause of Action

73. All of the Defendants have and have had the duty to prevent the above injuries from occurring to Plaintiff and her class; they have failed to do so neglecting their duty in violation of 42 U.S.C. 1986, their common law duties and their medical and professional obligations.

Eighth Cause of Action

74. Plaintiff has been denied her right to refuse treatment in violation of her First, Eighth, Ninth and Fourteenth Amendment rights and in violation of her common law rights. She has been denied her right to be let alone and to be free from interference with sensation and with her body and mind in violation of her First, Eighth, Ninth and Fourteenth Amendment rights.

75. Plaintiff, despite the repeated objections of her parent, has been and continues to be sedated with mind-affecting drugs at Pennhurst by Defendants. Plaintiff is able to function well in a non-sedated state. This treatment is for the purpose of staff convenience and is unnecessary, cruel, barbarous, untherapeutic and interferes with Plaintiff's habilitation.

Ninth Cause of Action

76. Defendants have been grossly negligent and incompetent in their care and treatment of Plaintiff, due to a callous disregard for her comfort, health and safety and due to deficient staff attention and resources and program. They have permitted the above-noted incidents of physical injury and abuse to occur despite the fact that they had knowledge or should have had kowledge of the deleterious conditions and improper practices which resulted in such injury and abuse. Defendants have committed assault and battery upon the Plaintiff, causing her physical harm and severe emotional distress. Defendants are liable at common law for these injuries.

77. Defendants are liable to Plaintiff for punitive and exemplary damages as a result of their conscious, deliberate, wanton and gross disregard for Plaintiff's life, health, rights and interests.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays this Honorable Court to grant the following relief:

1. Assume jurisdiction of this action and set the matter for an expedited hearing and determine it to be a proper class action.

2. Because the above breaches of the substantial rights of the Plaintiff and her class are of a continuing nature, and will cause further irreparable harm if not remedied, Plaintiff seeks a mandatory injunction on behalf of herself and her class to command Defendants to act to provide proper supervision, treatment and care at Pennhurst which has been denied to Plaintiff and her class. The Court is asked to determine the minimum constitutional and statutory and common law standards for care, Plaintiff and her class have no adequate remedy at law.

3. Award the named Plaintiff $250,000 in compensatory damages and $1,000,000 in punitive and exemplary damages.

4. Award costs, attorney's fees and grant such other relief as may be just, proper and equitable.

(s) DAVID FERLEGER
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Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-1345

Terri Lee Halderman, a retarded citizen, by her mother and legal guardian, Winifred Halderman, et al.,
Plaintiffs,

v.

Pennhurst State School and Hospital, et al.,
Defendants,

United States of America,
Applicant for Intervention.

MOTION TO INTERVENE

Pursuant to Rule 24(a), Federal Rules of Civil Procedure, the United States hereby moves for an order granting leave to intervene as a party plaintiff in the subject action which alleges severe and widespread violations of the constitutional rights of the residents of the Pennhurst State School and Hospital, Spring City, Pennsylvania.

This motion is based upon the pleadings and other papers on file in this action and the attached memorandum.

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J. STANLEY POTTINGER
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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Pursuant to Rule 24(a), Federal Rules of Civil Procedure, the United States seeks in its motion an order granting leave to intervene as a party plaintiff in the subject action which alleges severe and widespread violations of the constitutional rights of the residents of the Pennhurst State School and Hospital, Spring City, Pennsylvania.

I. *Rule 24(a)(2)*

Intervention may be defined as a procedural device whereby a non-party can present a claim in a pending action by becoming a party to that action. *Rocca v. Thompson*, 223 U.S. 317 (1911).

Under Rule 24(a)(2),[1] an application for non-statutory intervention as of right must

(1) be timely,

(2) show an interest in the subject matter of the action,

(3) show that the protection of the interest may be impaired by the disposition of the action, and

(4) show that the interest is not adequately represented by an existing party.

It is submitted that the United States has a direct and substantial interest in the *Halderman* proceedings, that court disposition of this private class action could impair that interest and that the existing plaintiffs do not adequately represent that interest.

This case was filed on May 30, 1974 and has therefore been pending for only a brief period of time. Pretrial discovery is in progress, and no trial date has been set. The United States' application for intervention in this action is clearly not untimely. *Smith Petroleum Serv. Inc. v. Montsanto Chemical Co.*, 420 F.2d 1103 (5th Cir. 1970); *Kozak v. Wells*, 278 F.2d 104 (8th Cir. 1960).

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[1] Rule 24(a)(2) provides:

Upon timely application anyone shall be permitted to intervene in an action: . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

A. *Interest*

Rule 24(a)(2) permits a nonparty to intervene "when the applicant claims an interest relating to the property or transaction which is the subject of the action . . ." The United States has an interest in the protection of the constitutional rights of all its citizens. This interest includes the nation's mentally retarded citizens who enjoy the same privileges and protections of the Constitution as do all citizens. Such citizens, because of their handicaps and confinement, must of necessity depend upon their guardians and in this case their institutional keepers as the protectors of their civil rights. Our mentally retarded citizens are, therefore, among those citizens least able to represent themselves and to bring to the attention of responsible officials substantial violations of their constitutional rights. Among those rights secured by the Constitution to our mentally retarded citizens confined in public institutions are the right to adequate care and treatment and the right to be free from harm during any such confinement.

The United States has a direct, substantial and legally protectable interest in vindicating the constitutional rights of residents confined to the Pennhurst State School and Hospital. The United States has an interest in the improvement of mental health and mental retardation facilities, the maintenance of adequate training for professional personnel, and the administration of proper treatment for mentally disabled persons. Large sums of federal money are expended annually in the area of mental health care under such programs as Medicaid, 42 U.S.C. 1396 *et seq.*, Medicare, 42 U.S.C. 1395 *et seq.*, and the Community Mental Health Centers Act, 42 U.S.C. 2681 *et seq.*

In order to protect its interest, the United States is participating in various capacities (plaintiff, plaintiff-intervenor, *amicus curiae* with the rights of a party, and as a traditional *amicus curiae*) in a series of cases seeking to protect the constitutional rights of mentally handicapped persons throughout the country. *See Wyatt v. Stickney,* 344 F. Supp. 373 and 387 (M.D. Ala. 1972), *affirmed sub nom. Wyatt v. Aderholt,* No. 72-2634, F.2d (5th Cir. Nov. 8, 1974) (mentally ill and retarded); *Wyatt v. Aderholt,* 368 F. Supp. 1383 (M.D. Ala. 1973) (sterilization standards for mentally retarded); *New York State Association for Retarded Citizens and Parisi v. Rockefeller,* C.A. 72-C-356 and 357, earlier decision at 357 F. Supp. 752 (E.D. N.Y. 1973) (mentally retarded); *United States v. Solomon,* C.A. N-74-181 (D. Md.) (mentally retarded); *North Carolina Association of Retarded Citizens and United States v. North Carolina,* C.A. 3050 (E.D. N.C., Raleigh Div.); *Stoner v. Miller,* 377 F. Supp. 177 (E.D. N.Y. 1974) (mentally ill and retarded); *Davis v. Watkins,* C.A. C-73-205 (N.D. Ohio, Western Div.) (mentally ill); *Horacek v. Exon,* C.A. 72-L-299 (D. Neb.) earlier decision, 357 F. Supp. 71 (D. Neb. 1973) (mentally retarded); *Alexander and United States v. Hall,* C.A. No. 72-209 (D. S.C., Columbia Div.) (mentally ill); *Bartley v. Kremens,* C.A. No. 72-2272 (E.D. Pa.) (civil commitment of minors to Pennsylvania institutions for the mentally ill and retarded).

The United States has standing to sue to enjoin widespread and severe deprivations of constitutional rights. *In re Debs,* 158 U.S. 564 (1895); *United States v. Brand Jewelers, Inc.,* 318 F. Supp. 1293 (S.D. N.Y. 1970); *United States v. City of Jackson,* 318 F.2d (5th Cir. 1963), *rehearing denied,* 320 F.2d 870 (5th Cir. 1963);

United States v. United States Klans, 194 F. Supp. 897 (M.D. Ala. 1961); *United States v. Lassiter,* 203 F. Supp. 20 (W.D. La. 1962) *aff'd.* 371 U.S. 10 (1962). In addition, the United States has standing to sue to protect its interests or to carry out its policies. *United States v. New York Times,* 403 U.S. 713 (1971); *United States v. Fitzgerald,* 201 F.2d 295 (8th Cir. 1912); *Cotton v. United States,* 11 How. 229 (1851); *United States v. San Jacinto Tin Company,* 125 U.S. 273 (1888); *Sanitary District v. United States,* 266 U.S. 405 (1925); *United States v. Bell Telephone Co.,* 128 U.S. 315 (1888).

B. *Impairment*

Rule 24(a)(2) provides that intervention of right will be permitted when "[the applicant] is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest."

Rule 24(a)(2) formerly required that the "applicant is or may be bound by a judgment in the action." This requirement was interpreted to mean that the applicant would be "bound" under the doctrine of *res judicata* and related doctrines. *See Sam Fox Publishing Co. v. United States,* 366 U.S. 983 (1961); *compare Hansberry v. Lee,* 311 U.S. 32 (1940). The 1966 amendment to the rule changed the test of *res judicata* to a factual test of practical impact.[2] Under the new rule, the applicant for interven-

[2] 39 F.R.D. 69, 110: Advisory Committee Notes.

"Original Rule 24(a)(2), however, made it a condition of intervention that 'the applicant is or may be bound by a judgment in the action,' and this created difficulties with intervention in class actions."

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"The Amendment provides that an applicant is entitled to intervene in an action when his position is comparable to

tion need show only that his interest may be adversely affected by the outcome of the litigation in which intervention is sought. *Atlantis Development Corporation v. United States,* 379 F.2d 818 (5th Cir. 1967); *Babcock S. Wilcox Company v. Parson Corporation,* 430 F.2d 531 (8th Cir. 1970); *Ionian Shipping Company v. British Law Insurance Co.,* 426 F.2d 186 (2d Cir. 1970); *Smuck v. Hobson,* 408 F.2d 175 (D.C. Cir. 1969).

The interest of the United States may be adversely affected by the outcome of this litigation because in a very real and practical sense, the trial of this lawsuit is the trial of any hypothetical action the United States could bring to vindicate its interest in the protection of the constitutional rights of the residents of the Pennhurst State School and Hospital. The facts in issue as well as the issues of law in dispute in this case would be identical in any future action brought by the United States. While principles of *res judicata* would not apply, *stare decisis* which dictates respect for prior judicial determinations of identical points of law, would loom large in any attempt by the United States to sue to protect its interest in the face of an adverse outcome in the *Halderman* proceedings.

The possible *stare decisis* impact of an adverse decision where identical questions of fact and law are in issue has been held sufficient to warrant intervention under Rule 24(a)(2). *Atlantis Development Corporation v. United States, supra; Nuesse v. Camp,* 385 F.2d 694 (D.C. Cir.

that of a person under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by existing parties. The Rule 19(a)(2)(i) criterion imports practical considerations, and the deletion of the 'bound' language similarly frees the rule from undue preoccupation with strict considerations of *res judicata.*"

1968); *Hartford Accident and Indem. Co. v. Crider*, 58 F.R.D. 15 (N.D. Ill. 1973); *Dudley v. Southeastern Factor and Finance Corp.*, 57 F.R.D. 177 (N.D. Ga. 1972).

C. *Adequacy of Representation*

Rule 24(a)(2) grants intervention "unless the applicant's interest is adequately represented by existing parties." Inadequacy may arise in cases where the representative is willing but unable to present the claim of the petitioner. *Lamar v. Granger*, 99 F. Supp. 17 (W.D. Pa. 1951); *see Plitt v. Hofferbert*, 125 F. Supp. 809 (D. Md. 1954).

This case presents difficult questions of law with which the United States has great expertise. Such expertise will enable the United States to valuably assist the court in the full development of all issues and facts involved in the subject litigation. Such efforts by the United States were recognized as an "exemplary service" by the court in *Wyatt v. Stickney, supra*, 344 F. Supp. at 375. Moreover, the United States has the resources necessary to fully develop the factual record in this case by initiating necessary investigation of all facts, conducting full and complete discovery, and presenting at trial the testimony of nationally recognized experts in the field of mental retardation concerning the adequacy of care and treatment of the residents of Pennhurst. Without a full factual record the court will be unable to structure appropriate relief which will meet constitutional requirements in this complex area of law.[3]

It should be noted that plaintiff's counsel seeks both injunctive relief and monetary damages. The United

[3] *See, e.g., Wyatt v. Stickney, supra* at 379 and 395. Cf. *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973).

States seeks only injunctive relief and, therefore, has a somewhat different interest in the outcome of this litigation. Plaintiff's counsel will be required to represent the interests of his clients, the named plaintiffs herein, and therefore may not have the requisite time necessary to adequately address the systemic and severe deprivations of constitutional rights alleged in this case.

II. *Conclusion*

The United States' intervention herein will serve the interests of judicial administration by avoiding multiple litigation over identical issues of law and fact. Should our intervention be denied, the United States would be under a serious obligation and duty to consider filing a separate lawsuit to vindicate its interests in the protection of the constitutional rights of the Pennhurst residents. Thus, permitting intervention will further consistency, accuracy, and efficiency and will avoid the possibility of inconsistent results. A second or additional lawsuit would be unwise.

Akin to judicial interest in the avoidance of a multiplicity of litigation is the judicial interest in having a judgment or decree be as complete as possible. The traditional equitable principle retains vitality to this day:

> . . . that when a decision is made, it shall provide for all the rights, which different persons have in the matters decided. For a 'Court of Equity, in all cases, delights to do complete justice, and not by halves,' to put an end to litigation, and to give decrees of such a nature, that the performance of them may be perfectly safe to all who obey them.

Calvert, *Parties to Suits in Equity* 2, 3 (2d ed. 1847).

The United States seeks therefore to represent the public interest, a fact which should be of major consideration to the court in considering this motion. See *Shapiro, Some Thoughts on Intervention Before Courts, Agencies and Arbitrators,* 81 Harv. L. Rev. 721, 734 (1968).

For the reasons set forth above, the United States respectfully requests that its motion for leave to intervene as a party plaintiff be granted. The United States respectfully requests a hearing on this motion at the court's earliest convenience.

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action

No. 74-1345

Terri Lee Halderman, a retarded citizen, by her mother and legal guardian, Winifred Halderman, et al.,
Plaintiffs

v.

Pennhurst State School and Hospital, et al.,
Defendants,

United States of America,
Plaintiff-Intervenor

COMPLAINT IN INTERVENTION

The United States of America alleges that:

(1) This is a class action brought on behalf of all residents of the Pennhurst State School and Hospital, Spring City, Pennsylvania, for money damages and to enjoin certain alleged violations of the constitutional rights of such residents secured by the First, Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States.

(2) This action is brought pursuant to 28 U.S.C. Sections 1343, 2201, 2202; 42 U.S.C. Sections 1983, 1985, 1986, and 1988.

(3) The United States of America intervenes in this action pursuant to Rule 24 (a), Federal Rules of Civil Procedure to enjoin severe and widespread deprivations of constitutional rights.

(4) Defendant Helene Wohlgemuth is the Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, and under Pennsylvania law, exercises responsibility for the operation and administration of the Department of Public Welfare which under Pennsylvania law is responsible for supervision of residential and day care programs for mentally retarded individuals, including the residential program or programs conducted at the Pennhurst State School and Hospital, Spring City, Pennsylvania.

(5) Defendant C. Duane Youngberg is Superintendent of the Pennhurst State School and Hospital, Spring City, Pennsylvania, and under Pennsylvania law exercises direct responsibility for residential and day care programs for mentally retarded individuals conducted at said school and hospital.

(6) Defendant Pennhurst State School and Hospital, Spring City, Pennsylvania, is established and operated pursuant to state law for the purpose of providing treatment and habilitative care to certain mentally retarded Pennsylvania citizens. It currently houses some 1,448 residents, the majority of whom are classified as severely or profoundly mentally retarded.

(7) Under Pennsylvania law, mentally retarded individuals can be and are involuntarily committed to and confined to the Pennhurst State School and Hospital.

(8) All, or nearly all, mentally retarded residents of the Pennhurst State School and Hospital are capable

of benefitting from treatment and habilitative care. As used in this complaint, the term "habilitative care" or "habilitation" means the process by which a mentally retarded individual is assisted in acquiring and maintaining those life skills which enable him to cope more effectively with the demands of his own person and his environment and to raise the level of his physical, mental and social efficiency. The term includes, but is not limited to, programs of formal, structured education and treatment.

(9) The defendants herein have failed or refused to provide treatment and habilitative care to residents of the Pennhurst State School and Hospital by, *inter alia,* the following:

(a) Failing or refusing to recruit, employ, and train qualified professional staff in sufficient numbers to carry out a minimally adequate program of treatment and habilitative care;

(b) Failing or refusing to design and implement treatment and habilitation plans and appropriate, individualized programs for all Pennhurst residents, including but not limited to programs of physical therapy, nursing and health care, and academic instruction;

(c) Failing or refusing to provide for Pennhurst residents a humane physical and psychological environment in which training and habilitation can take place.

(10) The defendants herein have failed or refused to provide Pennhurst residents with decent and humane living conditions, and to keep such residents free from harm by, *inter alia,* the following:

(a) Failing or refusing to recruit, employ, and train direct care personnel in sufficient numbers to supervise the daily life activities of Pennhurst residents, provide proper custodial care, and prevent such residents from inflicting harm upon themselves or others;

(b) Failing or refusing to provide in Pennhurst residents behavioral and social training sufficient to enable such residents to restrain themselves from antisocial or dangerous conduct, and to care for their own personal and hygienic needs;

(c) Authorizing, permitting, or failing or refusing to prevent the administration of excessive amounts of tranquillizing drugs to Pennhurst residents over extended periods of time;

(d) Failing or refusing to provide Pennhurst residents with living or sleeping space sufficient to insure protection from physical harm at the hands of others and a modicum of privacy and human dignity; and

(e) Failing or refusing to provide Pennhurst residents with clean, safe, and sanitary living and sleeping areas.

(1) At all times pertinent to the matters alleged in this complaint, defendants were and are acting under color of law, statutes, ordinances, regulations, customs, or usages of the Commonwealth of Pennsylvania.

(12) The acts and practices described in paragraphs 9 and 10 above are in violation of the Eighth, and Fourteenth Amendments to the Constitution of the United States of America.

(13) The acts and practices described in paragraphs 9 and 10 above constitute large-scale, severe and widespread deprivations of the constitutional rights of mentally retarded residents of the Pennhurst State School and Hospital. The proper treatment and habilitation of mentally retarded individuals is a matter of direct concern to the United States, as evidenced by a Presidential Statement on Mental Retardation, dated October 11, 1974, and Congressional enactments such as sections 1905(c) and (d) of Title XIX of the Social Security Act, as amended (42 U.S.C. 1396(c) and (d), the Education of the Handicapped Act (20 U.S.C. 1401 *et seq.*), and the Developmental Disabilities Services and Facilities Construction Act (42 U.S.C. 2661-2666, 2620-2677c).

(14) The relief sought herein is the only adequate or available remedy for the unconstitutional and unlawful acts and practices described in paragraphs 9 and 10.

(15) Unless restrained by order of this Court, defendants will continue to engage in the above described acts and practices, to the immediate and irreparable injury of the residents of the Pennhurst State School and Hospital and in derogation of federal policy and the national interest.

Wherefore, the Plaintiff-Intervenor prays that the Court enter an order enjoining the defendants, their officers, agents, employees, and successors in office, and all those acting in concert and participation with them, from engaging in the unconstitutional and unlawful acts and practices described in paragraphs 9 and 10 above, from failing or refusing to correct the effects of such acts and practices, and from failing or refusing to provide treatment and habilitative care to residents of the Penn-

hurst State School and Hospital in accordance with standards to be developed and adopted by the Court upon the basis of the record in this case.

Plaintiff-Intervenor further prays that this Court grant such other, different, and further relief as the interests of justice may require, together with the costs and disbursements of this action.

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action
Number 74-1345

Terri Lee Halderman, a retarded citizen, by her mother and legal guardian, Winifred Halderman,
Plaintiff

v.

Pennhurst State School and Hospital et al.,
Defendants

MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE

Facts

On May of 1974 this action was instituted by the filing of a Complaint.[1] In their Complaint the plaintiffs have asserted nine general claims which involve a multitude of factual allegations which challenge, as a denial of their right to treatment; practically all phases of their living conditions and treatment programs at Pennhurst. Plaintiffs have challenged their conditions on the basis

[1] This Complaint was amended in July of 1974 basically for the purpose of adding additional plaintiffs, the factual allegations were substantially unaltered.

of the First, Eighth, Ninth, and Fourteenth Amendments, as well as on principles of common law, and the statutes of the Commonwealth of Pennsylvania.

On November 18, 1974 the United States filed a Motion To Intervene pursuant to F.R.C.P. 24 (a) (2), together with a Complaint and memorandum in support of that motion. It is this motion on behalf of the United States that the defendants oppose.

Argument

The Defendants agree with the Intervenor's statements regarding the requisite conditions that must exist in order for nonstatutory intervention as of right to be permitted. Specifically the conditions that must exist before intervention as of right will be allowed are:

(1) The application to intervene must be timely,

(2) The applicant must have a protectable interest in the subject matter of the action,

(3) That said protectable interest in the subject matter of the action may be impaired by the disposition of the action, and

(4) That interest must not be adequately represented by the existing parties.

However the defendants submit that the United States has failed to meet three of the four requirements for intervention as of right, and in as much as failure under F.R.C.P. 24 (a) (2), to meet *any one* of the above requirements is fatal to a Motion To Intervene, it would be error to allow the United States to intervene in this lawsuit.

A. *The United States Has No Protectable Interest in This Lawsuit.*

The United States nakedly asserts that it has a "direct, substantial and legally protectable interest in vindicating the constitutional rights of residents confined to the Pennhurst State School and Hospital" (p. 4—U.S. Memorandum in Support of Motion To Intervene, hereafter U.S. Memo). In support of this assertion the United States points to three factors: (A) the fact that the Federal Government spends "large sums of federal money . . . annually in the area of mental health care . . ." (p. 4—U.S. Memo), (B) the fact that the United States is presently participating in varying capacities in various mental patients' rights cases, (C) and finally, the point of law that various courts have held that "the United States has standing to sue to enjoin widespread and severe deprivations of constitutional rights" (pp. 5-6 U.S. Memo).

As to the first contention of the United States, it is interesting to note that while pointing to the large sums of federal money that are involved in the provision of mental health services—nowhere in the applicant's complaint or prayer for relief have they alleged misuse of any federal funds at Pennhurst, nor have they asked this Court to in any way protect its interest in whatever federal funds may be involved in the Pennhurst institution. Defendants concede that the federal government may have a legally protectable interest in whatever funds may be involved at Pennhurst. However, that is not to say that this interest, standing alone, gives the United States the ability to intervene in this lawsuit, when it is clear that it is not its interest in federal funds which it seeks to protect.

Notwithstanding the fact that it is clear that the United States is not attempting to protect, by this intervention, its federal monies, it is also abundantly clear that, the disposition of this action will in no way "impair or impede [the Government's] ability to protect that interest." F.R.C.P. 24 (a) (2). For clearly the Federal Government has available and adequate statutory and administrative remedies to protect its interest in insuring proper use of Federal funds. [2]

Secondly the United States points to the fact that it is presently participating in various mental patients' rights cases as evidence of its concern over these issues. (See pp. 4-5 U.S. Memo). Concern is not enough. Defendants are unable to find any language in any of the cases cited by the United States, which could be located, that bears any relevance to the instant issue. Indeed the United States has pointed to no such language. Further, it is clear that in the cases which could be located the *ability* of the United States to participate was, at the very least, not an issue.[3] It is therefore submitted that the argument of the United States in this regard is wholly insufficient to allow intervention. In other words the cases to which the United States has directed this Court's attention are,

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[2] See 42 U.S.C. 1396 *et seq.*, 1395 *et seq.*, and 2681 *et seq.*

[3] See *Wyatt v. Stickney*, 344 F. Supp. 373 and 387 (M.D. Ala. 1972) participation by U.S. only as *amicus curiae; Wyatt v. Aderholt*, 368 F. Supp. 1383 (M.D. Ala. 1973) participation by U.S. only as *amicus curiae; Wyatt v. Aderholt*, No. 72-2634, role of U.S. unclear from opinion see p. 719 and note 3, and *New York State Association for Retarded Citizens and Parisi v. Rockefeller*, 357 F. Supp. 752 (E.D. N.Y. 1973) role of U.S. unclear see p. 766.

as far as defendants can best determine, no authority whatsoever for the proposition that the United States is entitled to intervene in this lawsuit.

Finally, the Federal Government argues that it does have standing to maintain this action. In support of this proposition the United States has directed this Court's attention to various authorities, all of which are inapposite to the case *sub judice*. Before discussing these cases it is first necessary to determine what type of "interest" is required under F.R.C.P. 24 (a) (2). In other words, must an applicant for intervention under F.R.C.P. 24 (a) (2) be possessed of such an interest in the subject matter of the litigation as would have given it standing to maintain an independent action? In the case of *Hobson v. Hansen*, 44 F.R.D. 18 (1968) Judge J. Skelly Wright addressed this problem and concluded as follows at p. 24 of that Opinion:

> . . . While one's interest need no longer be decisively affected before intervention will be allowed, there is nothing in the new rule or in its attendant commentary to indicate that it effected a change in the kind of interest required. [note omitted] Thus, the thrust of the revision seems clearly to be concerned with adequacy of representation and not with any notion of expanding the *types* of interests that will satisfy the rule. Still required for intervention is a direct, substantial, legally protectable interest in the proceedings. (Emphasis not added)

From the above language it is clear that the 1966 revisions had no impact on the nature of the "interest" required by F.R.C.P. 24 (a) (2), and therefore reliance on the Seventh

Circuit's straight-forward approach to this problem as demonstrated in the case of *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F.2d 564 (7th Cir. 1963) is proper. That Court held:

> [T]he question whether the State of Illinois, in behalf of the consumers can as of right intervene may be answered by posing another question which underlies and is vital to the first. The underlying question is: Could the State of Illinois bring a direct action against the defendants?" p. 567

See also *Toles v. United States,* 371 F.2d 784 (1967). Thus while it is now apparent that the unexplained assumption on the part of the United States that it must have independent "standing" in order to intervene in this case was correct. Unfortunately for the Federal Government however their assertion of standing will not be assumed to be correct, and the authorities upon which it relies are not helpful to its position.

The Applicant for intervention has cited eleven cases which it asserts support the proposition that the United States has standing to sue in this case. Six of these cases[4] uniformly contain findings that the United States has standing to protect its power to regulate interstate commerce by seeking equitable relief from illegal restrictions on the free flow of that commerce. It was the effect

[4] *In re Dobs,* 158 U.S. 564 (1895); *United States v. Brand Jewelers, Inc.,* 318 F. Supp. 1293 (S.D. N.Y.); *United States v. City of Jackson,* 318 F.2d (5th Cir. 1963), *rehearing denied,* 320 F.2d 870 (5th Cir. 1963); *United States v. United States Klans,* 194 F. Supp. 897 (M.D. Ala. 1961); *United States v. Lassiter,* 203 F. Supp. 20 (W.D. La. 1962), *aff'd* 371 U.S. 10 (1962).

on interstate commerce that gave the United States standing to sue in those cases, and not alleged violations of constitutional rights standing alone. Thus those authorities are not helpful, for here the Federal Government has not alleged any such deleterious effect on interstate commerce. The five remaining cases,[5] at the very most, held that the Federal Government had standing to sue to protect its own property including licenses, patents, and the like. Again it is clear from the complaint that the United States is not seeking to intervene out of a similar proprietary interest.

It is truly a naked assertion of standing on which the United States relies. Defendants on the otherhand are not alone in asserting that indeed the Federal Government lacks standing to vindicate the constitutional rights of certain citizens of Pennsylvania. In the case of *Allen v. County School Board of Prince Edward County,* 28 F.R.D. 358 (E.D. Va. 1961) the United States was not permitted to intervene as of right, in a school desegregation case, because it lacked the requisite interest or standing. Surely the difference in the constitutional rights which the federal government sought to protect in that case are no less compelling than the rights they seek to vindicate in the present action. As a matter of fact, Congress having recognized the potential problems of enforcement of

[5] *United States v. New York Times,* 403 U.S. 713 (1971), *Cotton v. United States,* 11 How. 229 (1851); *United States v. San Jacinto Tin Company,* 125 U.S. 273 (1888); *Sanitary District v. United States,* 266 U.S. 405 (1925); *United States v. Bell Telephone Co.,* 128 U.S. 315 (1888), and *United States v. Fitzgerald,* improperly cited by intervenor as 201 F.2d 295 (8th Cir. 1912), found at 201 Fed. Rep. 295 (8th Cir. 1912).

the Civil Rights Acts, and the lack of any protectable Federal interest in the important private litigation which was emmanating from the Civil Rights Acts, specifically authorized the Attorney General of the United States to intervene in such private litigation. See 42 U.S.C. §2000h-2 Obviously Congress has taken no such action with regard to the provision of mental health services. Thus it is clear that consistant with the Tenth Amendment to the United States Constitution this Court must find that the subject matter of this controversy does not affect any legally protectable interest or power which has by the Constitution been surrendered to the United States, and accordingly intervention as of right is not permissible. See *Sperry v. State of Florida,* 373 U.S. 379 (1962).

B. *Impairment*

Assuming *arguendo* that the Federal Government does indeed have standing to intervene, the disposition of this action will not impair that interest. The United States advances only one reason in support of their contention that their asserted interest will be impaired by the disposition of this suit. And that reason is *stare decisis* and its possible negative affect on future litigation that the United States may initiate in this area. This is a very loose interpretation of the holdings on this point, for surely if that were the standard then most governmental bodies, and certainly the United States could intervene in practically all federal cases involving issues of public concern. The correct formulation of the principle, that considerations of *stare decisis* may supply the requisite possible adverse affect under certain circumstances is found in *Atlantic Development Corp. v. United*

States, 379 F.2d 818 (5th Cir. 1967) where at p. 829 of the opinion that Court held:

> . . . this holding does not presage one requiring intervention of right in every conceivable circumstance where under the operation of the Circuit's stare decisis practice, the formidable nature of an en banc rehearing or the successful grant of a writ of certiorari, an earlier decision might afford a substantial obstacle. We are dealing here with a conjunction of a claim to and interest in the very property and the very transaction which is the subject of the main action. When those coincide, the Court before whom the potential parties in the second suit must come must itself take the intellectually straight forward, realistic view that the first decision will in all likelihood be the second and third and the last one.

While defendants join in the intervenor's obvious great respect for the opinions and reasoning of this Court, defendants respectfully submit that the *Halderman* suit need not, and probably will not, be the last word in the ever expanding area of mental patients' rights. And, in closing, a decision one way or the other in this case must not "in all likelihood" be the decision in other jurisdictions.

C. *Adequacy of Representation*

Having met all other requirements of Rule 24 (a) (2) in order to be able to intervene as of right the applicant must also demonstrate that the existing parties will necessarily be unable to represent the applicant's interest.

Edmonson v. State of Nebraska, 383 F.2d 123 (8th Cir. 1967). In this regard the United States relies solely on its avowed superior legal ability, and the fact that it will be able to concentrate its energies on only the claims for equitable relief. This is insufficient.

In the case of *Peterson v. United States,* 41 F.R.D. 131 (D. Minn. 1966) the Court set out three basic criterion for determining whether or not there is adequacy of representation. The first, that there is a collusion between the protagonists to the detriment of the intervener, is not alleged by the United States nor does it exist in this case. The second, that the positions taken by the parties in the case necessitates an adverse affect on the intervener's interest, is not alleged by the United States nor does it exist in this case. And the third, that the party purporting to represent the intervener's interest is failing to fulfill that responsibility, is not alleged by the United States nor does it exist in this case.

The fundamental problem with the position of the Federal Government in its effort to intervene in this lawsuit is that it and the plaintiff have asserted the same claims and seek the same relief for vindication of the same rights. And it is irrelevant that the Plaintiff has also sought damages for these alleged unconstitutional actions on the part of the defendants. In other words, one may not presume that the Plaintiffs will not vigorously pursue all the relief that they have requested.

The purpose of intervention is not to assure that only the best protagonists compete, but rather that all who have varying but related interests in the action are allowed to participate and protect their respective interests. This distinction was recognized and succinctly articulated in the case of *Norwalk CORE v. Norwalk Board of Education,* 298 F. Supp. 210 (1968) at p. 210.

> . . . Admittedly, applicants' interest in the education of their children is no less than that of plaintiffs', but it must be recognized that the right to intervene differs from the right to initiate a suit:
>
> "[I]ntervention is concerned with something more than standing to sue: it is concerned with protecting an interest which practically speaking can only be protected through intervention in the current proceeding. That petitioners share a common or identical interest with those who have standing to sue does not answer the question or entitle them to intervene."
>
> *Hobson v. Hansen,* 4 F.R.D. 18, 26 (D.D.C. 1968), appeal dismissed, 393 U.S. 801 (1968).

In this case it is manifestly clear that intervenor's Complaint and the Plaintiffs' Complaint are in all important respects the same. And that the presence of the United States would add nothing new to the existing controversy. There is no need, and certainly no right, in this case for more parties to advance the same claims and attempt to protect the same interests.

Conclusion

On the basis of the foregoing Defendants submit that the United States has fallen far short of the mandatory

requirements of F.R.C.P. 24(a) (2) and therefore the Motion To Intervene must be denied.

Respectfully submitted,
(s) Norman J. Watkins
Norman J. Watkins
Deputy Attorney General
Lawrence Silver
Deputy Attorney General
Chief, Civil Litigation
Israel Packel
Attorney General

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action

No. 74-1345

Terri Lee Halderman, a retarded citizen, by her mother and legal guardian, Winifred Halderman, et al.,
Plaintiffs

v.

Pennhurst State School and Hospital, et al.,
Defendants,
United States of America,
Applicant for Intervention

AMENDMENT TO UNITED STATES' MOTION TO INTERVENE

The United States moves to amend its Motion To Intervene, of November 25, 1974, which prior motion is incorporated herein by reference, and hereby so pleads in the alternative to its proposed intervention under Rule 24(a) F.R. Civ. P. that it be granted leave to intervene as a permissive party plaintiff under Rule 24(b) F.R. Civ. P. in the subject action.

This motion is based upon the pleadings and other papers on file in this action and the attached memorandum.

Robert B. J. Curran
United States Attorney
(s) Robert S. Forster, Jr.
Robert S. Forster, Jr.
Assistant United States Attorney
J. Stanley Pottinger
Assistant Attorney General
(s) Louis M. Thrasher
Louis M. Thrasher
(s) Ralph Hornblower, III
Ralph Hornblower, III
Attorneys
U.S. Department of Justice
Washington, D.C. 20530
(202) 739-5308

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action

No. 74-1345

Terri Lee Halderman

v.

Pennhurst State School and Hospital, et al.

ORDER

AND NOW, this 17th day of January, 1975, upon consideration of the Motion of the United States of America To Intervene as a Party Plaintiff, it is hereby ORDERED that the Motion is GRANTED.

(s) Raymond J. Broderick
Raymond J. Broderick
J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action
No. 74-1345

Terri Lee Halderman, et al.,
Plaintiffs

v.

Pennhurst State School and Hospital, et al.,
Defendants

MOTION TO DISMISS

Defendants, by their counsel, hereby move to dismiss the Complaint of the Plaintiff-Intervenor pursuant to F.R.C.P. 12 (b) on the basis of the following:

(1) The United States of America, Plaintiff-Intervenor, lacks standing to maintain this action.

Wherefore, defendants request that the Complaint[1] of United States of America, Plaintiff-Intervenor, in the above captioned matter be dismissed.

(s) Norman J. Watkins
Norman J. Watkins
Deputy Attorney General
Lawrence Silver
Deputy Attorney General
Chief, Litigation Division
Robert P. Kane
Attorney General

[1] See Memorandum in Support of this Motion To Dismiss discussion regarding the fact that the Plaintiff-Intervenor has never filed and served a Complaint in this matter after this Court granted Plaintiff-Intervenor's Application To Intervene in this action.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action

No. 74-1345

Terri Lee Halderman, et al.,
Plaintiffs

v.

Pennhurst State School and Hospital, et al.,
Defendants

United States of America,
Plaintiff-Intervenor

Pennsylvania Association for Retarded Citizens, et al.,
Plaintiff-Intervenors

ORDER

AND NOW, this 29th day of November, 1976, the Court having before it a number of motions which have been filed in connection with the above captioned matter, and having considered the pleadings and briefs of the parties, makes the following Orders in connection with said motions.

It is hereby ORDERED that:

1. The Motion To Dismiss filed by Commonwealth Defendants on July 12, 1974 is hereby denied.

2. The Motion To Dismiss Plaintiff-Intervenor, the United States of America, filed by Commonwealth Defendants on September 30, 1975 is hereby denied.

3. The Motion for Leave To File a Second Amended Complaint, filed by Plaintiffs, Terri Lee Halderman, et al., on March 31, 1976, is hereby granted.

4. The Motion To Dismiss filed by Defendants, Robert Strebl, Earl Baker, Leo McDermott and William A. McKendry on March 15, 1976, is hereby denied.

5. The Motion To Dismiss Plaintiff-Intervenor's, Pennsylvania Association for Retarded Citizens (P.A.R.C.), Complaint in Intervention as Amended by Stipulation of Counsel filed by Commonwealth Defendants on April 5, 1976 is hereby denied.

5a. The Motion To Dismiss, or In the Alternative, To Strike the Amended Complaint in Intervention of P.A.R.C. filed by the Commonwealth Defendants on April 5, 1976 is hereby denied.

6. The Court, having considered the Motion To Join Defendant Parties, filed on May 21, 1976 by Plaintiff-Intervenors, P.A.R.C., determines that said Motion is moot in that said Defendants will be before the Court after service of Plaintiffs' Terri Lee Halderman, et al., Second Amended Complaint.

7. The Motion To Dismiss filed by Defendants Frank Rizzo, the City Council of Philadelphia and Leon Soffer on June 1, 1976 is hereby denied.

8. The Motion to hold Commonwealth Defendants in Contempt of Court filed by Plaintiffs, Terri Lee Halderman, et al., on June 9, 1976 is hereby denied.

9. The Motion for a Protective Order To Seal All Discovery filed by Commonwealth Defendants on June 23, 1976 is hereby denied.

10. The Motion To Stay Discovery filed by Commonwealth Defendants on June 25, 1976 is hereby denied.

11. The Motion To Stay Discovery filed by Commonwealth Defendants on August 9, 1976, is hereby denied.

12. The Motion for a Protective Order filed by Commonwealth Defendants on August 23, 1976, is hereby denied.

13. The Motion To Compel Plaintiff-Intervenor, P.A.R.C., To Answer Interrogatories Number 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 20 and 22 of Commonwealth Defendants' First Set of Interrogatories filed on August 26, 1976, is hereby granted to the extent necessary to verify paragraph 4 of P.A.R.C.'s Amended Complaint insofar as the allegations of said paragraph pertain to the class of persons described in paragraph 15 of this Order.

14. The Motion To Compel Plaintiff-Intervenors, United States of America, to Answer Interrogatories Number 2, 3, 5, 6 and 7 of Commonwealth Defendants' First Set of Interrogatories to Plaintiff-Intervenor, United States of America, filed on November 28, 1975, is hereby denied.

15. In accordance with Rule 23(c) of the Fed. R. Civ. P., the Court determines that this litigation shall be maintained as a class action pursuant to Fed. R. Civ. P. 23(b)(1) and (b)(2); the Court having found that: (a) the class is so numerous as to make joinder of all members impracticable, (b) there are questions of law and fact common to the class and the claims of the plaintiffs

are typical of the class and predominate over any questions affecting only individual members, (c) the named plaintiffs will adequately and fairly protect the interest of the class, (d) a class action is superior to any other available method for the fair and efficient adjudication of the controversy, (e) the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, and (f) defendants have acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. The class shall consist of all persons who as of May 30, 1974, and at any time subsequent, have been or may become residents of Pennhurst State School and Hospital. The members of the class are persons resident at Pennhurst State School and Hospital, persons residing in Bucks, Chester, Delaware, Montgomery and Philadelphia Counties who are on a waiting list for placement at Pennhurst State School and Hospital, and persons residing in Bucks, Chester, Delaware, Montgomery and Philadelphia Counties who, because of the unavailability of alternate services in the community, may be placed at the Pennhurst State School and Hospital.

16. This Court's Order, dated October 4, 1976, staying discovery pending determination of the above motions is hereby VACATED.

17. It is further ORDERED that counsel for all parties shall meet in chambers, 10613 United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania, on

Wednesday, December 8, 1976, at 9:00 a.m., for the purpose of determining dates for the completion of a Pre-Trial Order and the Trial of this case.

(s) Raymond J. Broderick
Raymond J. Broderick,
J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C. A. No. 74-1345

Terri Lee Halderman, et al.,
Plaintiffs

v.

Pennhurst State School and Hospital, et al.,
Defendants

United States of America,
Plaintiff-Intervenor

Pennsylvania Association for Retarded Citizens, et al.,
Plaintiff-Intervenors

COMMONWEALTH DEFENDANTS' MOTION TO AMEND INTERLOCUTORY ORDER TO INCLUDE STATEMENT PRESCRIBED BY 28 U.S.C. §1292(b)

On November 29, 1976, this Court entered in the above captioned case its order denying Commonwealth defendants' Motion To Dismiss Plaintiff-Intervenor United States of America. Commonwealth defendants seek permission to take an immediate appeal under the provisions 28 U.S.C. §1292(b). The above described order does not contain the statement that, under 28 U.S.C. §1292(b), must be included before an appeal from an interlocutory order may be taken. Therefore, pursuant to Rule 5(a) of

the Federal Rules of Appellate Procedure Commonwealth defendants move the Court to amend paragraph 2 of such order to include the following statement:

> "In the opinion of the Court this Order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation".

In support of this Motion, Commonwealth defendants hereby state:

1. The order of the court dated November 29, 1976 involves a controlling question of law for the reason that if the United States has no legally cognizable interest in this action it may not participate as a plaintiff-intervenor in this action under Federal Rule of Civil Procedure 24.

2. A substantial ground for difference of opinion as to such order exists inasmuch as counsel for defendants believe the case of *United States of America v. Solomon*, C.A. No. N-74-181 (D. Md. Opinion filed July 8, 1976) is compelling authority for their contention that the United States has no legally cognizable interest as required by Federal Rule of Civil Procedure 24 for participation as plaintiff-intervenor in this action.

3. An immediate appeal from such order will materially advance the ultimate termination of litigation because a successful appeal will limit the participants in this action to only proper parties and relieve Commonwealth defendants from *inter alia* complying with time consuming and burdensome discovery requests of the United States, and the general defense against the expansive claims asserted by the United States.

4. An immediate appeal is necessary because of the substantial likelihood that this issue raised will otherwise escape review.

5. The order is not otherwise appealable under 28 U.S.C. §1292.

Commonwealth defendants further move the Court for an order staying all further participation in this case by the United States pending Commonwealth defendants' appeal from the above described order, as amended. In support of this additional request the defendants assert:

A. The continued participation of the United States may jeopardize the patients' quality of care in that significant amounts of resources will necessarily be diverted from delivery of services to responding to the United States sweeping discovery requests.

B. The Commonwealth defendants will suffer irretrievable financial losses and irreparable administrative burdens if they are compelled to continue defending against the claims of the United States prior to any review of this court's order.

Respectfully submitted,
(s) Jeffrey Cooper
Jeffrey Cooper
Deputy Attorney General
Norman J. Watkins
Deputy Attorney General
J. Justin Blewitt
Deputy Attorney General
Chief, Civil Litigation
Robert P. Kane
Attorney General

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C. A. No. 74-1345

Terri Lee Halderman, et al.,
Plaintiffs
v.
Pennhurst State School and Hospital, et al.,
Defendants
United States of America,
Plaintiff-Intervenor
Pennsylvania Association for Retarded Citizens, et al.,
Plaintiff-Intervenors

ORDER

AND NOW, this 13th day of December, 1976 upon consideration of Commonwealth Defendants' Motion To Amend Interlocutory Order To Include Statements Prescribed by 28 U.S.C. §1292(b) said Motion be and the same hereby is DENIED.

(s) Raymond J. Broderick
Raymond J. Broderick,
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2640

Frank S. Beal, et al.,

Petitioners

v.

Honorable Raymond J. Broderick,

Respondent

PETITION FOR A WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, FOR A WRIT OF PROHIBITION

Norman J. Watkins
Deputy Attorney General
Jeffrey Cooper
Deputy Atorney General
J. Justin Blewitt
Deputy Attorney General
Chief, Civil Litigation
Robert P. Kane
Attorney General

Department of Justice
Capitol Annex Building
Harrisburg, PA 17120
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. ————————

Frank S. Beal, Secretary of the Department of Public Welfare

Pennhurst State School & Hospital

Department of Public Welfare of the Commonwealth of Pennsylvania

Stanley Meyers, Deputy Secretary for Mental Retardation, Department of Public Welfare

Aldo Colautti, Executive Deputy Secretary, Department of Public Welfare

Wilbur Hobbs, Deputy Secretary for Southeastern Region, Department of Public Welfare

Russell Rice, Jr., Commissioner of Mental Retardation for Southeastern Region, Department of Public Welfare

C. Duane Youngberg, Superintendent, Pennhurst State School & Hospital

Robert Smilovitz, Former Assistant Superintendent, Pennhurst State School and Hospital

Joseph Foster, Assistant Superintendent, Pennhurst State School & Hospital

Margaret Green, Betty Uphold, Alice Barton, P. E. Klick, Dr. Parocca, Helen Francis, employees and agent of Pennhurst State School & Hospital

John Doctor, James Nurse, Jane Aide, Jill Therapist, Richard Roe, Jane Doe, unknown and unnamed staff, employees and agents of Pennhurst State School & Hospital, each individual Defendant individually and in his or her official capacity

Petitioners

v.

Honorable Raymond J. Broderick, Judge of the United States District Court for the Eastern District of Pennsylvania,

Respondent

PETITION FOR A WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, FOR A WRIT OF PROHIBITION

The above named petitioners, FRANK S. BEAL, et al., hereby apply, pursuant to Section 1651, Title 28, United States Code, and Rule 21 (a) of the Federal Rules of Appellate Procedure for a writ of mandamus or, in the alternative, for a writ of prohibition directed to the above named respondent, the Honorable Raymond J. Broderick, United Stattes District Court Judge for the Eastern District of Pennsylvania. In support of this application petitioners hereby state:

ORDER BELOW

By order dated November 29, and filed on November 30, 1976, respondent denied petitioners' Motion To Dismiss Plaintiff-Intervenors United States of America in the case of *Halderman, et al. v. Pennhurst State School and Hospital, et al.*, C.A. No. 74-1345 (E.D. Pa. Complaint

filed May 30, 1974). (Order attached hereto and made a part hereof as Exhibit "A"—see paragraph 2). [See Appendix to Petition at 59a.]

STATEMENT OF FACTS

The facts necessary to an understanding of the issues presented by this application are as follows:

1. *Halderman v. Pennhurst, supra,* was instituted on May 30, 1974. That action, brought by named residents of Pennhurst State School and Hospital and maintained on behalf of all individuals who since May 30, 1974, have resided in Pennhurst and those in the future who may reside in Pennhurst (Exhibit "A" at paragraph 15) was brought pursuant to the Civil Rights Act of 1871. Plaintiffs seek extensive injunctive relief as well as damages of approximately $5,000,000 for, *inter alia,* the alleged breach of plaintiffs' asserted constitutional rights to treatment and/or treatment in the least restrictive alternative (Plaintiffs' Second Amended Complaint attached hereto and made a part hereof as Exhibit "B"). [Omitted from Appendix to Petition.]

2. By Motions dated November 18, 1974 and December 12, 1974 the United States of America sought to intervene as a plaintiff in that action pursuant to F. R. C. P. 24 (a) or alternatively 24 (b) (Attached hereto and made a part hereof as Exhibits "C" and "D"). [See Appendix to Petition at 26a and 55a.]

3. On or about November 29, 1974, the defendants by Memorandum opposed the Motion To Intervene of the

United States of America for lack of standing (Attached hereto and made a part hereof as Exhibit "E"). [See Appendix to Petition at 43a.]

4. On January 17, 1975, without opinion, the following order was entered by respondent:

> And Now, this 17th day of January, 1975, upon consideration of the Motion of the United States of America To Intervene as a Party Plaintiff, it is hereby ORDERED that the Motion is GRANTED.

(Order attached hereto and made a part hereof as Exhibit "F"). [See Appendix to Petition at 57a.]

5. On or about April 11, 1975, plaintiff-intervenor United States of America filed its extensive "Request for Production of Documents, etc. Under Rule 34" (Attached hereto and made a part hereof as Exhibit "G"). [Omitted from Appendix to Petition.]

6. Pursuant to an agreement between counsel, on or about June 16, 1975, defendants filed objections to certain of the items requested in plaintiff-intervenor United States of America's Request for Production.

7. On or about August 27, 1975 plaintiff-intervenor filed its Motion To Compel Production of Documents as Requested.

8. On or about September 29, 1975, defendants filed their Response to Plaintiff-Intervenor's Motion To Compel Production of Documents.

9. On October 7, 1975 defendants moved to dismiss plaintiff-intervenor United States of America on the basis of a general lack of standing to participate as a plaintiff-intervenor in the *Halderman* action (Attached hereto

and made a part hereof as Exhibit "H"). [See Appendix to Petition at 58a.]

10. On or about April 30, 1976, defendants sought protection from the outstanding discovery demands of plaintiff-intervenor United States of America, asserting *inter alia,* that "the operation of Pennhurst State School and Hospital [would] be severely and adversely affected to the detriment of the citizens of Pennhurst" by compliance with the discovery demands (Motion for Protective Order attached hereto and made a part hereof as Exhibit "I"—See Affidavit of C. Duane Youngberg attached thereto). [Omitted from Appendix to Petition.]

11. By order dated May 11, 1976 respondent granted the United States' aforementioned Motion To Compel Production of Documents and simultaneously denied defendants request for protection from these discovery demands (Attached hereto and made a part hereof as Exhibit "J"). [Omitted from Appendix to Petition.]

12. On June 28, 1975 defendants moved to stay the United States' discovery pending disposition of the aforementioned Motion To Dismiss the United States (Attached hereto and made a part hereof as Exhibit "K"). [Omitted from Appendix to Petition.]

13. On or about August 17, 1976, plaintiff-intervenor United States of America sought the depositions of numerous Pennhurst employees as well as certain specified documentary materials. (Attached hereto and made a part hereof as Exhibit "L"). [Omitted from Appendix to Petition.]

14. On or about August 20, 1976, defendants moved for protection from the discovery requests de-

scribed above in paragraph thirteen (13) until the respondent disposed of defendants' Motion To Dismiss the United States of America (attached hereto and made a part hereof as Exhibit "M"). [Omitted from Appendix to Petition.]

15. By order dated October 4, 1976, respondent Broderick stayed all discovery in the *Halderman v. Pennhurst* case pending determination of all outstanding Motions (Attached hereto and made a part hereof as Exhibit "N"). [Omitted from Appendix to Petition.]

16. By order dated November 29, 1976, (Exhibit "A") [See Appendix to Petition at 59a.] respondent denied, without opinion, defendants motion to dismiss the United States of America (paragraph 2); denied all of defendants' outstanding motions for protective orders or stays (Paragraphs 9 through 12); and vacated its order of October 4 staying discovery (paragraph 16).

17. On December 10, 1976, defendants moved pursuant to 28 U.S.C. §1292(b) for certification of the question of the United States' standing, authority, or legal interests to participate in the *Halderman* action and to stay the further participation of the United States in that action pending an interlocutory appeal (Attached hereto and made a part hereof as Exhibit "O"). [See Appendix to Petition at 64a.]

18. By Order dated December 13, 1976 the Petitioners motion for certification of an interlocutory appeal from the denial of the motion to dismiss the United States was refused by the respondent (Attached hereto and made a part hereof as Exhibit "P"). [See Appendix to Petition at 67a.]

III. STATEMENT OF ISSUES PRESENTED

The issues presented by this Petition are as follows:

a. Did the respondent abuse his discretion and exceed his jurisdiction by allowing the United States of America to intervene in the *Halderman* action despite the United States' lack of standing and/or any legally cognizable interest in that action.

b. Did the respondent abuse his discretion and exceed his jurisdiction by denying Defendants' Motion To Dismiss the United States despite the United States' lack of standing or authority to participate in the *Halderman* action.

c. Did the respondent abuse his discretion and exceed his jurisdiction by depriving the *Halderman* defendants of their clear right to be free from the overwhelming and dangerous burdens of the United States' discovery demands when the United States has no standing authority or legally cognizable interest sufficient to participate in that action.

d. Did the respondent abuse his discertion and exceed his jurisdiction by depriving the *Halderman* defendants of their clear right to be free from the indirect prosecution by the United States of the damage claims brought by the individual plaintiffs when the United States lacks the standing, authority or a legally cognizable interest sufficient to participate in that action.

IV. STATEMENT OF RELIEF SOUGHT

The relief sought by petitioners herein is that this Court issue a writ of mandamus or other appropriate writ

such as a writ of prohibition directing respondent to dismiss the United States of America as plaintiff-intervenor from the *Halderman v. Pennhurst* lawsuit.

V. REASONS WHY THE WRIT SHOULD ISSUE

The reasons the writ requested herein should issue are as follows:

1. The United States of America has no standing, authority, or legally cognizable interest sufficient to participate as a plaintiff-intervenor in the *Halderman v. Pennhurst* action. *See United States v. Solomon,* 419 F. Supp. 358 (D. Md. 1976).

2. Defendants have a clear right to be free from the burdensome and dangerous discovery requests of an improper party plaintiff. *Cf. In re Estelle,* 516 F.2d 481 (5th Cir. 1976) *cert. den. sub nom. Estelle v. Justice,* U.S. (1976), 96 S. Ct. 2637 (1976) (Mr. Justice Rehnquist dissenting).

3. Defendants have exhausted every available means of protection from the dangerous and burdensome discovery requests of the United States of America, an improper party to the *Halderman v. Pennhurst* action, making this petition the only available means to protect Petitioners from Respondent's abuse of his jurisdiction by allowing the United States' prosecution of this action. *Estelle v. Justice, supra.*

4. The defendants have a clear right to be free from the participation of the United States of America in

an action for personal damages brought pursuant to the Civil Rights Act of 1871.

5. The issues raised herein may otherwise escape review. *Estelle v. Justice, supra.*

6. No other means exist whereby petitioners can seek review of the issues presented herein.

WHEREFORE, petitioners respectfully request that a writ of mandamus or other appropriate writ, such as a writ of prohibition, issue directing respondent, the Honorable Raymond J. Broderick, Judge of the United States District Court for the Eastern District of Pennsylvania to dismiss the United States of America as a plaintiff-intervenor in the action, *Halderman v. Pennhurst,* C. A. No. 74-1345 (E. D. Pa.).

Respectfully submitted,

NORMAN J. WATKINS
Deputy Attorney General
JEFFREYCOOPER
Deputy Attorney General
J. JUSTIN BLEWITT
Deputy Attorney General
Chief, Civil Law
ROBERT P. KANE
Attorney General

Department of Justice
Capitol Annex Building
Harrisburg, PA 17120

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2640

Frank S. Beal, et al.,
Petitioners

v.

Honorable Raymond J. Broderick,
Respondent

Present: Maris, Van Dusen and Adams, *Circuit Judges.*

It is ORDERED that the PETITION FOR A WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, FOR A WRIT OF PROHIBITION is dismissed.

By the Court:
VAN DUSEN
Circuit Judge

Dated: December 23, 1976

No. 76-1316

Supreme Court, U. S.
FILED
MAY 9 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

FRANK S. BEAL, ET AL., PETITIONERS

v.

RAYMOND J. BRODERICK, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

DREW S. DAYS, III,
Assistant Attorney General,

FRANK D. ALLEN, JR.,
JOHN C. HOYLE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1316

FRANK S. BEAL, ET AL., PETITIONERS

v.

RAYMOND J. BRODERICK, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ORDER BELOW

The order of the court of appeals dismissing, without opinion, the petition for a writ of mandamus or prohibition (Pet. App. 78a) is unreported.

JURISDICTION

The order of the court of appeals was entered on December 23, 1976. The petition for a writ of certiorari was filed on March 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in dismissing a petition for a writ of mandamus or prohibition which

sought to vacate orders of the district court permitting the United States to intervene in a civil rights suit alleging severe and widespread deprivations of the constitutional rights of mentally retarded persons committed to the Pennhurst State School and Hospital.

STATEMENT

Petitioners[1] seek review of the denial by the court of appeals of their "Petition For A Writ Of Mandamus Or, In The Alternative, For A Writ Of Prohibition." The petition sought to obtain the dismissal of the United States as a plaintiff-intervenor in *Halderman* v. *Pennhurst State School and Hospital,* E.D. Pa., C.A. No. 74-1345 (Pet. App. 68a, 75a-76a).

The mother and legal guardian of plaintiff Terri Lee Halderman, a resident of Pennhurst State School and Hospital (an institution for the retarded with an enrollment of more than 1600 persons), initiated this action on May 30, 1974, seeking injunctive and declaratory relief and damages for injuries which plaintiff suffered and continues to suffer during her commitment to Pennhurst (Pet. App. 1a-25a). The suit was certified as a class action (Pet. App. 61a-62a).[2]

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[1]Petitioners are the Secretary of the Pennsylvania Department of Public Welfare, other officials of that Department, the superintendent and other officials and employees of the Pennhurst State School and Hospital, as well as the Department of Public Welfare of the Commonwealth of Pennsylvania and the Pennhurst State School and Hospital.

[2]The class was defined as "persons resident at Pennhurst State School and Hospital, persons residing in Bucks, Chester, Delaware, Montgomery and Philadelphia Counties who are on a waiting list for placement at Pennhurst State School and Hospital, and persons residing in Bucks, Chester, Delaware, Montgomery and Philadelphia Counties who, because of the unavailability of alternate services in the community, may be placed at the Pennhurst State School and Hospital" (Pet. App. 62a).

Suit was brought under 28 U.S.C. 1331, 1343, and 42 U.S.C. 1983, 1985, 1986, 1988, 2201 and 2202; the complaint alleged that Halderman and members of her class suffer "deprivation and denial of their constitutional, statutory and common law right to treatment, and a deprivation and denial of their constitutional right to the least restrictive conditions necessary to achieve the purposes of commitment, right to refuse treatment, right to be free from Cruel and Unusual Punishment, right to Due Process of Law and right to the Equal Protection of the Laws" (Pet. App. 3a-4a).[3]

In November 1974, the United States moved, pursuant to Rule 24(a) and (b), Fed. R. Civ. P., to intervene as a plaintiff (Pet. App. 26a-27a, 38a, 55a-56a). The complaint in intervention alleged (Pet. App. 41a):

> The proper treatment and habilitation of mentally retarded individuals is a matter of direct concern to the United States, as evidenced by a Presidential Statement on Mental Retardation, dated October 11, 1974, and Congressional enactments such as

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[3]The complaint emphasizes the institution's inadequate staffing, facilities and supervision, and cites 40 reported injuries to plaintiff Halderman between March 1966 and November 1973 resulting from these inadequacies. These injuries include numerous scratches and lacerations, three bites (two identified as inflicted by another resident), and several fractures (including one broken toe resulting from going barefoot due to a shortage of shoelaces and one broken jaw resulting from a fall while wandering about the sleeping area at night in a straightjacket) (Pet. App. 10a-16a). It also cited the administration of sedative drugs and the use of physical restraints for the convenience of staff members, as well as inadequate feeding, training, clothing and hygienic care (Pet. App. 16a-19a). It alleged that the physical and emotional condition of plaintiff Halderman and the members of the class has substantially deteriorated since admission to Pennhurst, due to the environment provided by petitioners (Pet. App. 17a).

> Sections 1905(c) and (d) of Title XIX of the Social Security Act, as amended (42 U.S.C. 1396(c) and (d)), the Education of the Handicapped Act (20 U.S.C. 1401 *et seq.*), and the Developmental Disabilities and Facilities Construction Act (42 U.S.C. 2661-2666, 2620-2677c).

In its memorandum in support of the motion to intervene, the federal interest was further explained (Pet. App. 30a):

> The United States has a direct, substantial and legally protectable interest in vindicating the constitutional rights of residents confined to the Pennhurst State School and Hospital. The United States has an interest in the improvement of mental health and mental retardation facilities, the maintenance of adequate training for professional personnel, and the administration of proper treatment for mentally disabled persons. Large sums of federal money are expended annually in the area of mental health care under such programs as Medicaid, 42 U.S.C. 1396 et seq., Medicare, 42 U.S.C. 1395 et seq., and the Community Mental Health Centers Act, 42 U.S.C. 2681 et seq.

Petitioners estimate that more than a quarter of Pennhurst's total budget is funded by the federal government under Medicaid (Pet. 12).

The United States sought an injunctive order to prevent defendants from engaging in such acts and practices "to the immediate and irreparable injury of the residents of the Pennhurst State School and Hospital and in derogation of federal policy and the national interest" (Pet. App. 41a).

On January 17, 1975, the district court, without opinion, granted the motion of the United States to intervene.

(Pet. App. 57a). Petitioners moved to dismiss the United States as plaintiff-intervenor on the ground that the United States lacked standing (Pet. App. 58a). On November 29, 1976, the district court denied this motion (Pet. App. 60a). Petitioners then sought, pursuant to 28 U.S.C. 1292(b), certification of the question to the court of appeals and a stay of further participation of the United States pending the requested interlocutory appeal (Pet. App. 64a-66a). The district court denied both requests (Pet. App. 67a).[4]

Petitioners sought a writ of mandamus or, in the alternative, a writ of prohibition from the court of appeals on December 20, 1976 (Pet. App. 68a-77a). On December 23, 1976, the court of appeals, without opinion, dismissed the petition for the writ (Pet. App. [redacted]. 78a).[5]

ARGUMENT

The court of appeals correctly dismissed the petition for a writ of mandamus or, in the alternative, pro-

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[4]The district court ordered a bifurcated trial, with the first phase devoted to the issue of liability; issues relating to available remedies will be considered later, if necessary. The trial began on April 18, 1977. The plaintiffs and the United States have presented substantially all of their evidence relating to liability, and expect to rest shortly.

[5]Petitioners have applied to this Court for a stay of the United States' participation in the district court proceeding pending action on this petition for certiorari. Their application was denied by Mr. Justice Brennan on April 11, 1977, for failure to comply with Rule 51(2) of the Rules of this Court (requiring a showing that an application for the relief sought has first been made to the court below). After the court of appeals also denied a stay application on April 15, 1977, Mr. Justice Brennan again denied the application on April 19, 1977. On April 20, 1977, petitioners asked that their application be referred to Mr. Justice Rehnquist, who then referred the application to the full Court. Our response to that application is being filed with this brief.

hibition. This case presents no occasion for the exercise of those remedies, which are reserved for "really extraordinary causes." *Will* v. *United States*, 389 U.S. 90, 107; *Ex parte Fahey*, 332 U.S. 258, 259-260. Moreover, there is no conflict in the circuits; the only other court of appeals to consider the question presented here reached the same result as the court below. *In re Estelle*, 516 F. 2d 480 (C.A. 5), certiorari denied *sub nom. Estelle* v. *Justice*, 426 U.S. 925.[6] There is, accordingly, no need for further review by this Court.

Congress established a strong policy against piecemeal review in 28 U.S.C. 1291, which limits the court of appeals to review of final judgments. This policy is subject to carefully limited exceptions, which are not applicable, or were not invoked, in this case.[7] Petitioners cannot avoid this firm rule of finality by seeking review of interlocutory orders under the guise of mandamus. That

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[6]Indeed, several of the factors found troubling by the Justices who dissented from the denial of certiorari in *Estelle* are absent here. The United States did not here seek to add additional parties defendant to the suit or to enlarge the relief sought. Compare Pet. App. 5a-7a and 25a, with Pet. App. 38a and 41a-42a; cf. 426 U.S. at 927. Moreover, the fact that Pennhurst is partially supported by federal funds provides an even more substantial basis for the federal interest in assuring that the institution does not deprive citizens of their constitutional rights than was evident in *Estelle*. Cf. 426 U.S. at 928-929.

[7]The district court denied petitioners' request for certification for an interlocutory appeal under 28 U.S.C. 1292(b); accordingly no appellate jurisdiction exists under that Section. *United States* v. *687.30 Acres of Land*, 451 F. 2d 667 (C.A. 8), certiorari denied *sub nom. Winnebago Tribe of Nebraska* v. *United States*, 405 U.S. 1026; *Van Hoomissen* v. *Xerox Corp.*, 497 F. 2d 180 (C.A. 9). Petitioners have not sought to notice an appeal under any of the carefully limited exceptions to the final judgment rule contained in 28 U.S.C. 1292(a) or the doctrine of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546. In any event, none of those exceptions are applicable here.

writ is neither a substitute for appeal nor a device to control the exercise of discretion by the district courts. *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383. The legal basis for permitting intervention may not be challenged before appeal from the final judgment, because such orders are "inherently interlocutory since they [do] not terminate any phase of the litigation." *Equal Employment Opportunity Commission* v. *American Telephone and Telegraph Co.*, 506 F. 2d 735, 742 (C.A. 3); *In re Estelle, supra; Roach* v. *Churchman*, 457 F. 2d 1101 (C.A. 8); *Van Hoomissen* v. *Xerox Corp.*, 497 F. 2d 180 (C.A. 9). The proper remedy for review of such an order is appeal from the final judgment. See, *e.g.*, *Securities and Exchange Commission* v. *United States Realty and Improvement Co.*, 310 U.S. 434, *In re Estelle, supra*, 516 F. 2d at 484, *Stell* v. *Savannah-Chatham County Bd. of Educ.*, 333 F. 2d 55 (C.A. 5), certiorari denied *sub nom. Roberts* v. *Stell*, 379 U.S. 933.[8]

Petitioners, nevertheless, assert four reasons for invoking the extraordinary remedy of mandamus: (1) "The United States has absolutely no legally cognizable interest which it seeks to protect by intervening in the *Halderman* case" (Pet. 12); (2) "[i]n this case it is probable that the issue of the United States' standing or authority to proceed against the petitioners will evade appellate review" (Pet. 14); (3) the questions raised are "of great magnitude involving the delicate area of federal-state relations" (Pet. 16); and (4) petitioners will suffer irreparable harm if mandamus is not granted (*ibid.*). None of these reasons warrants granting the writ here.

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[8]Even were the appeal timely, the general rule is that "the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court." *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 506.

1. The interest of the United States in stopping widespread and severe deprivations of constitutional rights of mentally retarded persons in a federally funded institution is substantial and supports the district court's decision permitting the United States to intervene.[9]

Large sums of federal money are expended annually for the care of mentally handicapped citizens under such programs as Medicaid, 42 U.S.C. 1396, *et seq.*; Medicare, 42 U.S.C. 1395, *et seq.*; and the Community Mental Health Centers Act, 77 Stat. 290, as amended, 42 U.S.C. 2681, *et seq.* Indeed, petitioners estimate that more than a quarter of the total Pennhurst budget is received from the federal government under Medicaid (Pet. 12). Congress has required adequate treatment for the mentally retarded as a condition of receiving federal funds. See, *e.g.*, Title XIX, Social Security Act, 49 Stat. 620, as amended and added, 85 Stat. 809, 42 U.S.C. (Supp. V) 1396d(c) and (d); Cf. *King* v. *Smith*, 392 U.S. 309; *United States* v. *San Francisco*, 310 U.S. 16.

Petitioners suggest (Pet. 12-13) that the only means by which that requirement may be enforced is the one specifically authorized by statute—the termination of the flow of federal funds available to assist the States in meeting the needs of mentally retarded individuals. Surely, the Executive Branch is better fulfilling its duties to "take

[9]The United States sought intervention under Rule 24(a), Fed. R. Civ. P. (intervention of right) and under Rule 24(b), Fed. R. Civ. P. (permissive intervention). In granting the United States' motion to intervene, the district court did not specify the Section under which it was acting. In such a situation, the district court's ruling is sustained if either section is satisfied. *Nuesse* v. *Camp*, 385 F. 2d 694 (C.A. D.C.). While the requirements for intervention under the two Sections differ (see Pet. 7-8), the petition makes no argument based on that difference; in any event, the interest of the United States described in the following text is sufficient to satisfy the requirements of either Section.

Care that the Laws be faithfully executed," United States Constitution, Article II, Section 3, see *In re Neagle*, 135 U.S. 1, 63-67, by participating in a suit to secure the constitutional rights of individuals residing in a federally funded institution than it would be terminating federal funds, thereby decreasing the resources available to help the individuals for whose benefit Congress enacted the legislation. The failure of Congress explicitly to authorize intervention by the United States in such a case should not be construed to imply a denial of the authority to act in matters so vitally affecting the interests and policy of the United States. See *United States* v. *California*, 332 U.S. 19, 27-28.

The national policy in favor of securing the rights of the mentally retarded, particularly those who are in institutions, is well established and recognized by all three branches of government. Federal courts have acted to protect those rights in numerous cases. See, *e.g.*, *Wyatt* v. *Stickney*, 325 F. Supp. 781, 334 F. Supp. 1341, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala.), affirmed *sub nom. Wyatt* v. *Aderholt*, 503 F. 2d 1305 (C.A. 5); *New York State Ass'n For Retard. Ch., Inc.* v. *Carey*, 393 F. Supp. 715 (E.D. N.Y.); *Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn.). Congress has enacted legislation endeavoring to protect the rights and improve the conditions of the mentally retarded.

See, *e.g.*, the Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. 94-103, 89 Stat. 496, 42 U.S.C. (Supp. V) 6001-6081;[10] Title XIX, Social Security Act, as amended and added. 42 U.S.C. (Supp. V) 1396d(c) and (d); and the Education of the Handicapped Act, 84 Stat. 175, *et seq.*, 20 U.S.C. 1401, *et seq*. The President has also recognized "the need to assure those who are retarded their full status as citizens under the law," Executive Order No. 11776, March 28, 1974, 39 Fed. Reg. 11865, and has directed "that the Department of Justice take steps to strengthen the assurance of full legal rights for the retarded." President's Statement on Mental Retardation, November 16, 1971, 7 Weekly Compilation of Presidential Documents, 1530 (1971).

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[10]Section 6010 provides, in part (emphasis added):

> Congress makes the following findings respecting the rights of persons with developmental disabilities:
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> (1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.
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> (2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.
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> (3) The Federal Government and the States both have an obligation to assure that *public funds* are not provided to any institutional or other residential program for persons with developmental disabilities that—
>
> (A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or

Rule 24(b) provides for permissive intervention when the applicant's claim and the main action have a common question of law or fact. The federal government is responsible for enforcing 18 U.S.C. 241 and 242, the criminal counterparts of 42 U.S.C. 1983, upon which plaintiff Halderman's claim is based. These criminal sanctions, requiring high standards of proof (see, *e.g.*, *Screws* v. *United States*, 325 U.S. 91), do not provide an adequate means of securing prompt correction of the wide-scale abuses alleged in this case, and, thus, the United States may resort to civil litigation to seek a remedy that will ensure the full effectuation of the civil rights of individuals that the criminal statutes are intended to protect. *Wyandotte Co.* v. *United States*, 389 U.S. 191; see also *United States* v. *Republic Steel Corp.*, 362 U.S. 482;

> (B) does not meet the following minimum standards:
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> (i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.
>
> (ii) Provision to such persons of appropriate and sufficient medical and dental services.
>
> (iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.
>
> (iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation of such persons.
>
> (v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.
>
> (vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.

Texas & Pacific Ry. v. *Rigsby*, 241 U.S. 33; *J. I. Case Co.* v. *Borak*, 377 U.S. 426. That right to resort to civil litigation constitutes a claim involving questions of law and fact common to the claim asserted by the private plaintiffs in *Halderman*.[11]

2. Contrary to petitioners' contention (Pet. 14-15) there is no substantial likelihood that the question of the United States' standing or authority to participate in this case will evade appellate review. The United States would be an appellee in any appeal notice by petitioners, and petitioners could specifically challenge the United States' intervention at that time. If the United States

[11]Petitioners rely primarily (Pet. 13-14) on *United States* v. *Solomon*, 419 F. Supp. 358 (D. Md.), appeal pending, for support for their assertion that the United States has no interest in participating in this litigation. *Solomon*, a district court decision from which the United States has appealed, is unlike the present case because it does not involve mandamus and because the issue there is whether the United States could initiate a lawsuit rather than, as here, participate in a case that was initiated by other parties. In addition, to the extent *Solomon* indicates that the United States has no standing to initiate a lawsuit to protect the rights of mentally handicapped citizens, and, for that reason, cannot assert a "claim" cognizable under Rule 24(b), the decision is contrary to the great weight of authority. Many district courts have permitted the United States to intervene in suits seeking to protect the rights of mentally handicapped citizens. See, *e.g.*, *Horacek* v. *Exon*, 357 F. Supp. 71 (D. Neb.); *Alexander* v. *Hall*, 64 F.R.D. 152 (D. S.C.); *North Carolina Association for Retarded Children* v. *State of North Carolina*, 420 F. Supp. 451 (M.D. N.C.); *Stamus* v. *Leon Hardt*, 414 F. Supp. 439 (S.D. Iowa); *Gary W. & United States* v. *Stewart*, C.A. No. 74-2412-C, E.D. La.; *Stockton & United States* v. *Alabama Industrial School*, C.A. No. 2834-N, M.D. Ala.; *Rone & United States* v. *Fireman*, C.A. No. 75-35A, N.D. Ohio; *Evans* v. *Washington*, C.A. No. 76-0293, D. D.C.; *Santana & United States* v. *Rios*, C.A. No. 75-1187, D. Puerto Rico.

or the original plaintiffs appeal, petitioners may challenge the United States' intervention by a timely cross - appeal under Fed. R. App. P. 4(a). See Wright and Miller, *Federal Practice and Procedure: Civil*, §1923 (1972).

3. Finally, withholding appellate review of this issue until appeal from final judgment will not, contrary to petitioners' contention (Pet. 16-17), result in irreparable harm to them. The harm of which petitioners principally complain is a result of the suit itself, not of the intervention by the United States. Even if the United States were denied the right to intervene as a result of an interlocutory appeal, the suit brought by the private parties would continue, and the potential liability of the individual petitioners as well as the risk that minimal treatment standards may be imposed, would remain.

Petitioners also complain (Pet. 17) about the "overwhelming litigation strategy of the federal government," but they have not shown that the United States is pursuing anything other than proper avenues for the conclusion of this litigation that are also available to private plaintiffs.[13] Such complaints should be made to the trial court, not to this Court as a reason for invoking mandamus. See *In re Estelle, supra*, 516 F. 2d at 484.[14]

[13]In any event, an interlocutory appeal at this time should not affect the extent of discovery to which petitioners are subject, since the presentation of the government's case at trial is substantially completed.

[14]Petitioners also give as a reason for invoking mandamus that the questions here "are of great magnitude involving the delicate area of federal-state relations" (Pet. 16). They make no further argument why this reason justifies the issuance of the writ in this case, and standing alone it does not warrant this Court's granting the petition. Cf. *Estelle, supra*, 426 U.S. at 930.

In sum, there is no reason here to depart from the established modes for review of interlocutory orders, such as the one in question, and thus no justification for the use of the extraordinary remedy of mandamus to interfere with the trial court's decision to permit the United States to participate in this litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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